

Searching for Accommodations within the Ontario Criminal Justice System for Persons  
with Fetal Alcohol Spectrum Disorder: Views of Social Service Agency and Justice  
Professionals

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## Abstract

Although persons with intellectual disabilities have been conceptualized as having rights to equality in Canada and internationally, there continue to be gaps in the delivery of justice when they are involved within the criminal process. The literature consistently reported that individuals with Fetal Alcohol Spectrum Disorder (FASDs) often experienced challenges within the justice system, such as difficulty understanding abstract legal concepts (Conry & Fast, 2009). In the Canadian legal system, accommodations are available to enable persons with disabilities to receive equal access to justice; however, how these are applied to persons with FASDs had not been fully explored in the literature. In this study, in-depth interviews were conducted with social service agency workers (n=10) and justice professionals (n=10) regarding their views of the challenges persons with FASDs experience in the justice system and their suggestions on the use of accommodations. The findings showed that while supports have been provided for individuals with intellectual disabilities, there has been a lack of specialized accommodations available specifically for individuals with FASDs in accessing their right to justice.

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## **Introduction**

Historically, individuals with disabilities have been marginalized in accessing their rights on an equal basis with others. However in recent years there has been a shifting paradigm in the field of human rights for those with intellectual disability (ID). As opposed to exclusively focusing on the ways an individual can adjust to their environment, onus is now being placed on the environment to adjust in order to accommodate the differing needs of persons with ID. This interactional model that places emphasis on both biological characteristics and the responsibility of the environment to support individual difference have played a role in the shifting paradigms in the conceptualization of intellectual disability.

In response to the change in the conceptualization of intellectual disability, there have been recent changes in legislation that acknowledge the human rights of those with ID. For example, the enactment of the UN Convention on the Rights of Persons with Disabilities (2006) highlights the call for policies and guidelines to be developed that can support those with intellectual disability in accessing their human rights in a way that they deserve.

With this changing paradigm, there has been a shift in response by the Criminal Justice System (CJS) in ensuring that the legal rights of those with differing needs are protected. For example the CJS has begun to implement various programs and accommodations to support those with ID such as the development of mental health courts and Dual Diagnosis Justice Case Managers. The development of such programs emphasizes this bi-directional model of support that takes into account biological features

of intellectual disability as well as the responsibility of the environment to support them through the legal process.

Although there has been a response by the justice system to provide accommodations to support those with ID more broadly, there is an increasing need for the CJS to acknowledge the unique needs of those with Fetal Alcohol Spectrum Disorder (FASDs). Individuals with FASDs are a specific population that present unique challenges when interacting with the CJS such as vulnerability to suggestibility during police interview, difficulty understanding abstract concepts, remembering the details of the criminal act they were involved in, as well as struggling to communicate with justice professionals (Fast & Conry, 2009; 2004; Moore & Green, 2004, Novick-Brown, Gudjonsson & Connor, 2011). Although there is limited research on specialized accommodations needed for those with FASDs within the CJS, recent support for Bill C-583 (2014) to include a definition of FASDs in the Criminal Code is the first step in a shift in response by the justice system to support the unique needs of this population.

This body of literature will review the reconceptualization of intellectual disability and the implications of this shifting paradigm when considering the legal rights of those with ID. This review will also discuss the special considerations for persons with FASDs in terms of the incidence of FASDs within the legal system and the nature of their primary and secondary disabilities. This will be followed with an examination of the increased vulnerabilities for persons with FASDs in the Criminal Justice System. Finally, this review will explore accommodations and services that are currently used to support individuals with intellectual disability and FASDs within a Canadian context.

## **Theoretical Framework: A biopsychosocial perspective in accessing legal rights for those with FASD**

### **Shifting Paradigms in the Conceptualization of Intellectual Disability.**

Westernized societies can sometimes create dichotomies where groups and individuals are classified as either abled/disabled or normal/abnormal (Kirby, 2004). In practice, individuals and groups are more complex than the binaries presented.

There are various conceptualizations about individuals with intellectual disabilities and their role within society. The conceptualizations reinforce varying degrees of biological or social foundations of the disability. The paradigms construct them as either passive or active members within the community. The biomedical model reinforces a biological understanding of disability whereby ID is a result of physical or mental impairment that can place individuals at a disadvantage within society (Kirby 2004). The biological model of disability does not take into account the environment within which individuals with ID live, and the role that the social world plays in reinforcing disadvantage and supporting them through the development of services that can aid them in accessing their rights as citizens.

But it is clear that while disability can have real, material consequences on individuals' lives, disability is a social construct that includes and excludes various dimensions and experiences. Thinking about disability as socially constructed allows one to recognize power and knowledge, and how the very concept of disability can influence discourses that can sometimes place individuals with ID as appearing passive, abnormal and in need. Consistent with the biological model in which individuals with ID are recognized for their deficits and perceived inadequacy, individuals with intellectual

disabilities have historically been marginalized and social spaces and service delivery systems are sometimes inaccessible due to the discourses surrounding disability (Tisdall, 2012). As opposed to being seen as individuals who have agency and possess various strengths as well as weaknesses, persons with ID have been conceptualized as inadequate and their disability becomes his or her defining characteristic.

In opposition to the biomedical assumption of ID that seeks to change or treat the characteristics of individuals with developmental disabilities on an individual level, the social model examines their experiences vis-à-vis their wider environment and the role of the social world in creating discourses about ID (Kirby, 2004). The social model of development focuses on the role of the social service delivery systems in supporting individuals with intellectual disability (Owen, Griffiths, Tarulli & Murphy, 2009). In contrast to conceptualizing persons with ID based on their biological disadvantages, as laid out in the biological perspective, the social model is focused on the ways society and its delivery systems can be improved and structured in order to support individuals with ID in accessing their human rights in a fair way. The social model perspective puts more of the onus on society to provide services and support to ensure persons with ID are able to exercise autonomy within their own world, compared to their biological and physical attributes.

More recent conceptualizations of intellectual disability include an integration of the biological and social models to create a more holistic understanding of intellectual disability. This perspective explains disability through a lens that addresses not only the biological and genetic aspects of an individual but also the role of the social environment (Wicks-Nelson & Israel, 2009). A biopsychosocial model takes into account the

biological factors associated with an individual as well as the influence of psychological and external factors (Wicks-Nelson & Israel, 2009). As opposed to the biomedical model of disability that places individuals with intellectual disability at a disadvantage due to their ID (Kirby, 2004), or the social model that focuses solely on the role of an individual's external environment (Owen et al., 2009), the biopsychosocial model provides a more integrative and cohesive framework which includes the biological characteristics, emotional and social aspects that affect an individual's life (Dart, Gapen & Morris, 2002). The ways in which persons with ID are thought about, talked about and treated, including as human beings who deserve respect and rights equivalent to others with disabilities, is central to this holistic approach.

**Implications of the shifting Paradigms in the Conceptualization of Intellectual Disability and the Legal System.** Traditionally, legal rights have been awarded based on an individual's capacity to understand the legal process, communicate with counsel and know his or her rights and responsibilities within the court process (Flynn & Arstein- Kerslake, 2014). But the connection between capacity and legitimate legal rights has resulted in persons with ID being excluded from the justice system, and barriers in accessing their fundamental rights such as maintaining counsel or communicating with justice professionals in a way that they understand (Flynn & Arstein- Kerslake, 2014). In recent years, however, the creation of legislation such as the United Nations Convention on the Rights of Persons with Disabilities (2006) has begun to address both the human and legal rights of persons with ID. Article 12 of the UN Convention on the Rights of Persons with Disabilities (2006) asserts "State Parties shall take appropriate measures to provide access by persons with disabilities to the support

they may require in exercising their legal capacity” (UN, 2006, p.10). In addition, Article 13 states that:

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages (p.11).

Ensuring that accommodations are available within the CJS as mandated by the *UN Convention on the Rights of Persons with Disabilities* (2006) will help to ensure that persons with ID are able to exercise their rights to justice and actively participate (Marinos et al., 2009). Subsequently, the Canadian Criminal Code (1985) has established specific accommodations to support those with intellectual disability through the court process.

There are a number of sections within the Criminal Code that offer accommodations for individuals with a range of developmental disabilities involved in the justice system. It is important to note that under the Canadian Criminal Code both intellectual disabilities and mental illness are considered “mental disorders” as laid out in both section 2 and section 16 of the document (Canadian Criminal Code, 1985).

Within the Canadian Criminal Code (1985), section 486.1 specifically addresses support provisions that must be made available to individuals with both mental health issues and developmental disabilities. This section of the Criminal Code states that both witnesses under the age of 18 as well as adults who have a ‘mental disorder’ are entitled to a support person of their choice to assist them when testifying in court. Moreover, the judge has the power to determine whether or not having a support person present and

close to the individual during court interrogation will help to produce the best evidence possible (Canadian Criminal Code, 1985).

In addition to permitting a support person during testimony, section 486.2 of the Canadian Criminal Code (1985) accommodates individuals with intellectual disabilities by allowing testimony to be given outside the courtroom. If an individual with a disability has the capacity to communicate with counsel and provide reliable evidence but experiences difficulties doing so within the courtroom they can provide their testimony in a separate room or behind a screen. Providing accommodations as laid out in the Criminal Code such as having a support person present or giving evidence in an alternate location can help to reduce the emotional and psychological distress that can occur when being questioned on the stand. As mentioned by Ericson, Perlman & Isaacs (1994), having a support person present during questioning can also provide support to justice professionals concerning effective ways to communicate with the witness. Effectively implementing accommodations and modifications within the court process can help to decrease the likelihood that persons with developmental disabilities experience stress and a breakdown of testimony during interrogation, resulting in more reliable evidence (Marinos et al., 2009). It is important to note that accommodations laid out within the Canadian Criminal Code (1985) are only available for victims and witnesses. This can pose a challenge for accused with intellectual disability, as they are not entitled to the formalized support and accommodations laid out within the Canadian Criminal Code on an equal basis as victims and witnesses with a range of intellectual disabilities. However accessibility officers and dual diagnosis case workers can provide assistance upon identification of an issue and availability within a courthouse for support.



With the development of various legislations geared towards the rights of persons with intellectual disabilities such as the UN Convention of the Rights of Persons with Disabilities (2006) and the Canadian Criminal Code (1985), individuals with ID are better able to exercise their right to equality. According to Endicott (2009):

There is an emerging ‘culture of rights’ that is embedding itself in people’s thinking, and particularly in the thinking of the members of professions that have historically been primarily focused on ‘fixing’ people, rather than fixing the policies, practices, laws and other structures of society of which they are a part (p. 12).

Consistent with the holistic nature of the biopsychosocial perspective, the onus would fall upon the justice system to provide accommodations and adaptations for the varying abilities of an individual with a disability, rather than requiring the individual to fit into a system that will not provide them the opportunity to equally participate.

When developing unique and specialized supports to assist individuals with ID in accessing justice it is important to keep in mind that those with disabilities may be differently circumstanced (Law Commission of Ontario, 2012). It is critical that the programs implemented are individualized to address a range of abilities. For example, some individuals may require a single visit to an empty courtroom to understand the expectations of court, while others may require multiple visits to both empty and working courtrooms in order to fully comprehend what is expected of them, where to sit, and who will be present during the upcoming trial (Pathak, 2010). According to the Law Commission of Ontario (2012) there is often more of a focus on the functional aspects of a disability rather than a broader human rights approach. As opposed to developing ways to treat the features of the disability that put someone at a disadvantage, focus must also be put on the social and emotional dimensions of disability that translates into adjusting

the legal environment to support individual difference. This will help to assist individuals with disabilities in accessing their rights to justice, have their needs addressed, and be treated with dignity and respect.

Consistent with the biopsychosocial model that takes into account both biological and social factors, the integration of specialized supports within the justice system for individuals with ID addresses their diverse needs and how these needs can be effectively supported through the development of specialized accommodations. Applying a biopsychosocial perspective when conceptualizing the legal rights of individuals with ID can be done by acknowledging an individual's varying needs and adjusting the external environment to support those needs whether it is by modifying police interview techniques, providing testimonial aids or preparing the individual for court. This holistic conceptualization of ID that takes into account both the individual and the environment has the potential to aid individuals with ID in accessing their legal rights in a fair and accessible way.

The role of substantive equality as laid out in Law Commission of Ontario's Final Report (2012) addresses the legal rights of individuals with intellectual disability and their inherent right to legal rights within the justice system. Substantive equality has a deeper focus on the concept of differential treatment that addresses the varying needs of individuals with ID (Law Commission of Ontario, 2012) and how this may, in fact, create more equitable experiences for individuals with ID within the court process. Substantive equality requires justice professionals who apply laws to do so in a way that address the differing needs of diverse individuals. For example, implementing services such as preparing a witness with ID for court (Pathak, 2010) or allowing a support person during

testimony as laid out in section 486.1 of the Canadian Criminal Code (1985) can be alternative accommodations that can help to eliminate barriers experienced in the court process, resulting in individuals accessing their legal rights. As opposed to the medical model that seeks to treat an individual's biological characteristics, the concept of substantive equality reinforces a more biopsychosocial model whereby various service delivery systems such as the CJS address the individual difficulties persons with disabilities often experience and work to eliminate the barriers that can prevent equal access to human rights.

Within Ontario, steps have been taken to ensure courts within the province are fully accessible for individuals with disabilities by the year 2025. The review *Making Ontario's Courts Fully Accessible to Persons with Disabilities* (Government of Ontario, 2006) provides a framework that is meant to address the barriers to accessibility that individuals with disabilities experience, and offers recommendations to ensure they are active participants within the court process. The review suggests a need for specific court officials that are responsible for ensuring individuals with disabilities are connected with the appropriate accommodations necessary to support them through the court process, such as accessing legal aid or referring individuals to appropriate legal counsel (Government of Ontario, 2006). In fact in Ontario, Accessibility Coordinators are available in some courthouses in the event that individuals and counsel would like to access assistance in overcoming barriers in the court process (see <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/accessibility2014.asp>). Training of some justice professionals employed by the Ontario Ministry of the Attorney General has already begun; training on how to communicate and support persons with ID

effectively is a key to meaningful accessibility for persons with ID (Government of Ontario, 2006). The review of *Making Ontario's Courts Fully Accessible to Persons with Disabilities* conceptualizes individuals with disabilities as capable of being active participants within the justice system and worthy to receive legal rights on an equal basis as others who do not have an ID.

Applying an integrated biopsychosocial and human rights-based approach when developing accommodations can be a way to reflect the principle of equity laid out in the UN Convention on the Rights of Persons with Disabilities. As stated in the Canadian Charter of Rights and Freedoms (1982), everyone has the inherent right to justice and to be seen equally before the law. Practice must reflect the policies that have been put in place that outline the basic rights of every individual no matter someone's gender, race, religion or ability level. More broadly, advancements in individualized supports will lead to breaking down the discourses and ideologies that place individuals as incompetent and in need of fixing. In line with the biopsychosocial perspective, providing accommodations that address the complexities of the justice system and individuals' different biological and emotional needs can ensure individuals with ID can be active members within the justice system and access their legal rights.

We have seen a positive shift to a more biopsychosocial perspective and human rights approach to thinking about persons with disabilities. This shift has been beneficial for persons with disabilities, on the whole, in gaining attention to their inequalities and has led to specific broad-based changes within the criminal justice system. However I argue that the next step in achieving the goals set out within international legal frameworks and the Charter is to ensure that needs-based accommodations and supports

are implemented in practice for more complex groups such as those with FASD in order for substantive equality be achieved.

### **The Nature of the Primary and Secondary Disabilities associated with FASDs**

It is important to acknowledge the reasons why individuals with FASDs are at an increased risk of coming into contact with the law compared to individuals with other intellectual disabilities. Similar to those with FASDs (O'Malley, 2008), individuals with other intellectual disabilities can be characterized as having limitations in areas of cognitive and adaptive functioning and can develop secondary issues such as mental health problems (Owen & MacFarland, 2002). However the nature of the primary disabilities associated with FASD can put someone at an increased risk of experiencing trouble with the law. For example, the primary disabilities commonly associated with FASDs such as impulsivity, issues with judgment, suggestibility, and difficulty linking cause and effect can greatly influence an individual with FASD into taking part in criminal activity (Fast & Conry, 2009; Streissguth, Barr, Kogan and Bookstein, 1996). The nature of these primary disabilities, which will be examined in more detail within this literature review, have the potential to increase the likelihood of an individual with FASD interacting with the Criminal Justice System, whether it is because of poor decision-making, vulnerability to manipulation or not learning from consequences of past dealings with the CJS (Fast & Conry, 2009; McMurtie, 2011; Streissguth et al., 1996). As opposed to other intellectual disabilities, the specific characteristics associated with this disability highlights the need of increased awareness and a greater understanding of the experiences of those with FASD within the CJS.

**The Effects of Prenatal Alcohol Exposure.** Individuals with FASDs are diagnosed on a continuum that outlines the various effects and severity that prenatal alcohol exposure can have on an individual. As defined Streissguth (1997), Alcohol Related Birth Defects (ARBD) and Fetal Alcohol Effects (FAE) are positioned at the least severe end of the FASD spectrum where there are no physical markers but behaviour challenges are present (Lyons-Jones & Streissguth, 2010; Streissguth, 1997). Individuals with Partial Fetal Alcohol Syndrome (pFAS) not only have neurodevelopmental impairments but also exhibit physical anomalies associated with FASD. Fetal Alcohol Syndrome (FAS) is positioned at the most severe end of the spectrum where individuals experience significant distinguishing physical features and well as behavioural challenges (Lyons-Jones & Streissguth, 2010; Shaffer, Kipp, Wood & Willoughby, 2010; Streissguth, 1996). Astley (2013) also defines FASDs along a continuum that includes FAS and pFAS, similar to Streissguth (1997) but also includes Static Encephalopathy/ Alcohol-Exposed where there is severe brain dysfunction without facial features and Neurobehavioural Disorder/Alcohol- Exposed where there is moderate brain dysfunction without the facial features (Astley, 2013).

A study by Streissguth (2007) examined the effects of prenatal alcohol exposure from birth to 25 years of age. This longitudinal study found that the mothers who reported a high incidence of drinking during mid to late stages of pregnancy had children who exhibited a significant number of physical anomalies including short palpebral fissures and a thin upper lip. When evaluating the height, weight and head circumference of children with FASDs, there are noticeable differences at birth. Children with FASDs tend to be smaller at birth than children who do not have FASDs (Streissguth, 2007).

Studies have shown, however, that the height, weight and head circumference of children with FASDs becomes less noticeable as children get older (Sampson, Bookstein, Barr & Streissguth, 1994; Streissguth, 2007; Streissguth, Barr, Bookstein, Sampson & Carmichael-Olsen, 1999). Therefore more reliable markers are physical anomalies such a flat mid-face and thin upper lip.

According to the current literature, individuals diagnosed with Fetal Alcohol Spectrum Disorder have neurodevelopmental impairments such as sensory deficits, gaps in focusing attention as well as retaining information. Individuals with FASD may also experience difficulties in applying proper social skills in various environments, have poor judgment, be vulnerable to manipulation and impulsivity, and do not comprehend the concept of consequences (Blackburn et al, 2010; Streissguth, 2007; 1999). The study by Streissguth (2007) examined the neurodevelopmental problems associated with FASDs. It was found that children with FASDs experienced increased difficulties with attention, memory in mathematics, as well as information processing. At 4 years old, 90% of the individuals with FASD experienced impairments in attention and reaction. Similarly at 7 years old, the same children experienced difficulties with memory, problem solving and attention. Additionally, a longitudinal study by Streissguth et al., (1999) examining the neurological impairments of individuals diagnosed with FASD found that by the second grade, children with FASDs were more likely to need additional help from teachers in areas of grammar, word recall and staying focused in the classroom. In order to prevent increased difficulties associated with the neurological impairments of FASDs as well as the development of secondary disabilities, early identification and support must be provided.

Finally, secondary disabilities may not be present at birth. However in many instances the adverse effects of the primary disabilities of FASDs combined with environmental factors such as family, socioeconomic status and geographic location can contribute to the development of secondary disabilities (Clark et al., 2004; Pei, Denys, Hughes & Rasmussen, 2011). Secondary disabilities associated with FASDs can include mental health problems, difficulty making and maintaining healthy relationships, problems with school and dependent living, as well as problems with employment, inappropriate sexual behaviour and trouble with the law (Clark et al., 2004; Disney, Iacono, McGue, Tully & Legrand, 2008).

In studies, partially funded by the Province of British Columbia, on secondary disabilities associated with FAS/FAE, Fast, Conroy and Looke (1999) reported that youth with FAS/FAE were overrepresented in forensic psychiatric inpatients. This same group presented frequently with conduct disorder, substance abuse and attention deficit hyperactivity disorder (Conroy, Fast & Looke, 1997), although they had above average cognitive disabilities.

Kotrla and Martin (2009) identified that social workers have the skills to help individuals deal with the primary disabilities associated with FASDs such as impulsiveness, lack of judgment and making social connections. According to Kotrla and Martin (2009), social workers can help both individuals with FASDs and their families maintain stable housing and experience a nurturing environment that supports the characteristics of FASDs. These supports can help reduce the likelihood of developing secondary disabilities associated with FASDs such as engaging in criminal activity and taking part in inappropriate sexual behaviour. Having consistent support services, such as



social workers, can help to reduce the likelihood of problematic behaviour that individuals with FASD sometimes encounter in adolescence and adulthood (Kotrla & Martin, 2009).

### **Special Considerations for persons with FASDs**

**The incidence of FASD within the legal system.** Individuals with FASDs are a complex group that experience a range of unique challenges within the justice system. Although there is a limited amount of Canadian research about the rate of those with FASDs involved in crime, research in the United States by Streissguth et al., (1996) has reported that approximately 42% of persons with FASDs experience trouble with the law, in large part due to the combination of biological and social factors. Persons with FASDs experience deficits such as poor impulse control, challenges with memory, as well as issues with adaptive functioning (O'Malley, 2008) that impair decision-making. In combination with their increased risk of economic and educational marginalization, they are more likely to be involved in anti-social behaviour.

Research has shown that individuals with disabilities have an increased vulnerability to being victimized as well as becoming involved in criminal activity (Fast & Conry, 2009). A significant number of individuals with FASDs often take part in criminal activity and get into trouble with law during adolescence and adulthood. Streissguth, Bookstein, Barr, Sampson, O'Malley and Young (2004) (as cited in O'Malley, 2008) reported that 67% of the adolescents and 87% of the adults who took part in criminal activity were arrested, charged and/or convicted. The primary disabilities associated with FASDs can lead to individuals being more likely to make poor judgments

and take part in criminal activity (Fast & Conry, 2009), leading to additional challenges when involved with the criminal justice system (McMurtie, 2011).

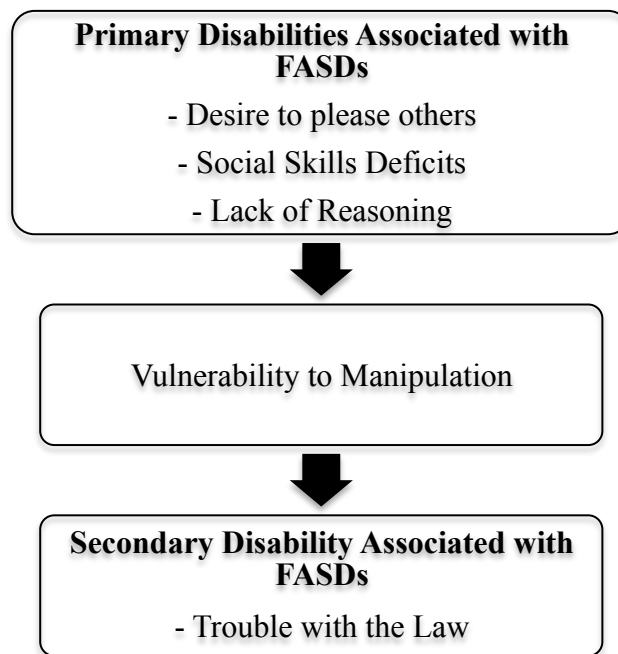
Research by Streissguth et al., (1996) found that 60% of the adults and youth with FASDs experience over a span of 4 years had been in trouble with the law. Individuals with FASDs are known to have the desire to please others (Fast & Conry, 2009).

Although it is important to note that individuals with FASDs often take part in crime due to the primary disabilities associated with the disability, their desire to please others can also make someone with FASDs more susceptible to being influenced or manipulated into taking part in crime (see Figure 1). A study by Clark, Lutke, Minnes, Ouellette-Kuntz, (2004) examined the secondary disabilities among individuals with FASDs.

Caregivers of 62 individuals with FASDs were interviewed about the secondary disabilities associated with their clients. The results showed that 92% of the respondents reported the individuals they worked with were vulnerable to manipulation. Being vulnerable to manipulation can leave an individual more susceptible to ‘secondary victimization’. According to Smith-Thiel et al., (2001), “secondary victimization occurs when an individual with FASDs is used by others to perpetuate a crime” (p.125).

Characteristics such as the desire to please others, social skills deficits and a lack of reasoning may lead individuals with FASDs to be more easily influenced into taking part in criminal activity, resulting in being charged with a criminal offence. In addition to being impulsive and having a desire to please others, individuals with FASDs often do not learn from their mistakes. The desire to please others paired with not learning from previous mistakes can further perpetuate secondary victimization by being manipulated into multiple criminal acts. Due to the primary disabilities associated with FASDs,

individuals often experience difficulties in many aspects of their lives including difficulties in education, issues with drugs and alcohol addictions, maintaining employment and stable housing as well as developing healthy relationships with others (Streissguth, 1996).



*Figure 1.* The role of vulnerability to manipulation in taking part in criminal activity

**Lack of Awareness of FASDs by Justice Professionals.** As previously mentioned, individuals with FASDs encounter a range of cognitive and behavioural difficulties (Blackburn, Carpenter & Egerton, 2010; O'Malley, 2008), which can make someone vulnerable to experiencing additional challenges when involved in the CJS such as difficulty understanding the complex nature of the court process (Ericson & Perlman, 2001; McLachlan, Roesch, Viljoen & Douglas, 2014), remembering details of the crime (Blackburn et al., 2010; Fast & Conry, 2009) and being suggestible during police questioning (Clark et al., 2004; Fast & Conry, 2009). The lack of visible physical features that justice professionals can recognize creates increased complexity for individuals with

FASDs because the disability can often go unnoticed (Hamelin, Marinos, Robinson & Griffiths, 2011). This highlights the importance of raising awareness of the vulnerabilities individuals with FASD have when interacting with the justice system.

A consensus statement on Fetal Alcohol Spectrum Disorder- Across the Lifespan by the Government of Alberta (2009) provided a guideline for prevention, understanding and support of those with FASDs. It was recommended that more awareness of the incidence of FASDs is needed in addition to an increased need for the development of educational tools to be available to train professionals who work directly with this population (Government of Alberta, 2009). Fraser (2008) has provided suggestions on how to effectively provide education about FASDs for justice professionals. The guidelines include:

- Justice professionals at all levels should receive training about the nature of FASDs
- Training should be accurate and coherent across jurisdictions
- Justice professionals should impart the information they have learned to other professionals within the field
- Education about FASDs should begin during law school and at the police academy level
- Training should include topics such as common myths about FASDs, primary disabilities associated with FASD, how to identify FASDs and tips on how to communicate effectively with this population (p.10)

**Identifiable Features of FASDs.** FASD has been described in terms of primary and secondary disabilities. Individuals with prenatal alcohol exposure are vulnerable to many primary and secondary disabilities associated with FASDs, whether they are physical, neurological and/or behavioural. Current research about Fetal Alcohol Spectrum Disorder (FASDs) is focused on the primary disabilities associated with the disorder such as difficulties with impulse control, adaptive functioning, memory and linking cause and

effect (O'Malley, 2008) and secondary disabilities relating to how the symptomology of the disabilities have the potential to increase a person with FASD's risk to behaviours such as coming into contact with the law. Individuals with FASDs are at risk of becoming involved in criminal activity and experiencing additional challenges once in the justice system due to impairments in reasoning, judgment, as well as the desire to please others (Fast & Conry, 2009). Research has shown that the management of primary disabilities can help to impede the occurrence of secondary disabilities related to FASDs, such as becoming involved in criminal activity (Blackburn et al., 2010; Wicks-Nelson & Israel, 2009). With the standardization and consistent use of early diagnostic tools<sup>1</sup> (Astley & Clarren, 2000), intervention and prevention supports can be put in place to help manage primary disabilities and prevent the development of secondary disabilities that may occur in adolescence and adulthood such as involvement in crime. Additionally, the use of standardized diagnostic methods can be a way to obtain accurate prevalence rates<sup>2</sup> of FASDs.

Fetal Alcohol Spectrum Disorder arises from organic brain damage due to prenatal alcohol exposure (Wicks-Nelson & Israel, 2009). Individuals who are diagnosed with FASD usually display subtle physical features such as short palpebral fissures, and a

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<sup>1</sup> The 4-Digit Diagnostic Code was a tool developed by Astley and Clarren (2000) to assist healthcare professionals in accurately diagnosing individuals with FASD. The tool assesses individuals in 4 areas including: 1.) Growth deficiency, 2.) FAS facial phenotype, 3.) Damage or dysfunction in the central nervous system, and 4.) Gestational alcohol exposure. Individuals are assessed based on the severity in each of the 4 areas in order to determine whether or not FASD is present and to what degree. Evaluations of the diagnostic tool concluded that it provided a precise and accurate way to assess whether not an individual has FASD and it yielded consistent results (Astley & Clarren, 2001; 2000).

<sup>2</sup> According to Health Canada (2006), it is estimated that 9 in every 1,000 babies are born with FASD in Canada each year. Although in recent years there has been an increase in research surrounding FASD, there continues to be inconsistent reports of prevalence rates. This can be due to a lack of standardized diagnostic methods (Astley & Clarren, 2001; Blackburn et al, 2010; Lyons-Jones & Streissguth, 2010), mothers' denial of consumption, as well as healthcare professionals reluctance to ask mothers whether or not alcohol was consumed during pregnancy (Lyons-Jones & Streissguth, 2010).

smooth philtrum (Blackburn et al., 2010; Shaffer, Kipp, Wood & Willoughby, 2010). Additionally, individuals with FASDs sometimes have a short upturned nose, a flat nasal bridge, asymmetrical ears and a receding forehead and chin (Blackburn et al., 2010; Shaffer et al, 2010; Warren, Hewitt & Thomas, 2011). It is important to note that the features of FASDs are often difficult to identify (Hamelin et al., 2011). This is why it is paramount that justice professionals are trained in identifying the behavioural and cognitive features of FASDs, such as difficulty with memory, understanding abstract concepts, vulnerability to manipulation and suggestibility. Professionals being trained in identifying not only the physical features of FASDs but also the behavioural features can help to refer the individual for assessment, increasing early identification of FASDs within the justice system (Fraser, 2008).

**Lack of identification and screening within the CJS.** It has been suggested that upwards of 75% of individuals with intellectual disability are not recognized as having an ID when interacting with the justice system (Smith, Polloway, Patton & Beyer, 2008). Research by McAfee and Gural (1988) examined the stages within the justice system where persons with intellectual disabilities are most often identified as having an ID whether it was during pre-trial, trial or post-trial. It was found that only 27% percent of individuals were identified as having an intellectual disability at arrest, whereby most persons with intellectual disabilities were identified in the later stages of the judicial system or went completely undetected (McAfee & Gural, 1988). Specific to FASDs, research by Douglas, Hammill, Russell and Hill (2012) examined justice professionals' knowledge of FASD and their ability to identify the disability. When justice professionals

were asked how often they have suspected a client of theirs having FASD, 42% of the respondents had never suspected FASDs.

With the lack of identification of ID as well as more complex groups such as FASDs, there is an increasing need for justice professionals to be skilled in identifying the possibility of a disability. The Southern Network of Specialized Care (2013), established by the Ministry of Community and Social Services (MCSS) developed a handbook for professionals to gain a deeper understanding of the complex needs of those with a possible dual diagnosis. The handbook highlighted questions that justice professionals can ask an individual during questioning to assist in identifying a possible intellectual disability. The questions are as follows:

- Did you graduate from high school? Did you receive a
- certificate of completion?
- Did you ever repeat a grade in school?
- Did you have someone help you with your learning in school?
- Have you ever lived in a group home or somewhere where you get support from others?
- Have you ever had a job? Do you get money every month from the government? (p.5)

Comparably, Canadian researchers, Fast and Conry (2009) have developed the ALARM screening tool that can help justice professionals to identify the difficulties that affect individuals with FASDs (see Figure 2). The implementation of this screening tool across jurisdictions within the Criminal Justice System can be a critical step in identifying FASD early on in the legal process as well as to assess whether further assessment is needed.

<b>Adaptive Behaviour</b>	<ul style="list-style-type: none"> <li>• Challenges in completing life skills eg. self-care, independence</li> </ul>
<b>Language</b>	<ul style="list-style-type: none"> <li>• May have adequate verbal skills but lack comprehension</li> </ul>
<b>Attention</b>	<ul style="list-style-type: none"> <li>• Very impulsive</li> <li>• Difficulty remaining focused</li> </ul>
<b>Reasoning</b>	<ul style="list-style-type: none"> <li>• Difficulty linking cause and effect</li> <li>• Trouble learning from consequences</li> </ul>
<b>Memory</b>	<ul style="list-style-type: none"> <li>• Poor short term memory</li> <li>• Confabulation of details</li> </ul>

*Figure 2. ALARM Screening Tool developed to assist in identifying FASD (Fast & Conry, 2009, p. 252).*

### **Increased Vulnerabilities for Persons with FASD in the CJS**

The neurodevelopmental impairments experienced by some individuals with FASDs can lead to a further disadvantage when navigating throughout the various stages of the Criminal Justice System. Novick-Brown (2008) has highlighted some major challenges and issues individuals with developmental disabilities often encounter when involved with the legal system:

1. Individuals with ID may appear as though they understand their legal rights but in fact do not.
2. They may have a desire to please the interviewer and therefore respond with what they think the officer or lawyer wants to hear
3. Due to the intimidating nature of the police interview, they may be unintentionally led by the interviewer to confess to a crime they did not commit.
4. Individuals with ID may become easily agitated and frustrated during questioning, resulting in a breakdown of testimony.
5. They may forget the details of the crime they took part in or witnessed. (p.147)



The following section will examine challenges that those with FASDs often experience when they are interacting with the justice system, including; understanding abstract concepts, issues with memory and suggestibility.

**Understanding Abstract Concepts.** Research by McLachlan et al. (2014) examined the “psycholegal abilities” of young offenders with FASDs. McLachlan et al. (2014) compared the ability to understand and communicate during pre-trial and legal proceedings between youth with FASDs and youth who do not have the diagnosis. Results showed that youth accused with FASDs scored statistically significantly lower than their peers without a diagnosis in terms of understanding their legal rights. Approximately 76% of young offenders with FASDs experienced challenges with at least one “psycholegal ability”, including understanding abstract concepts and communicating with justice professionals.

Similarly, Ericson and Perlman (2001) explored the understanding of legal jargon by adults with mild intellectual disabilities compared to adults with the absence of ID. Participants were scored on their conceptual knowledge of 34 legal terms such as ‘police officer’, ‘Crown attorney’, ‘court’, ‘adjourn’, ‘guilty’ and ‘prosecute’. Results showed that individuals with ID experienced challenges understanding legal concepts as well as the various roles of justice professionals within the court system. It was statistically found that of the 34 legal terms and concepts individuals were asked to explain, persons with an intellectual disability successfully explained 24% terms compared to those without ID who understood approximately 82%.

It has been suggested by the Law Commission of Ontario (2012) that social service delivery systems, such as the Criminal Justice System are complex and difficult to

navigate for individuals with various intellectual disabilities. This can lead to individuals with ID not being able to access the supports necessary to navigate their way through these systems effectively. These challenges can be ameliorated by ensuring that individuals with FASDs and other developmental disabilities are able to easily access specialized supports that can address their needs effectively, such as adjustments to police interview techniques (Ericson et al., 1994), access to victim/witness services and easy access to counsel (Hamelin et al., 2011; Jeffery, 2010).

**Memory Loss.** An individual with FASDs can experience challenges with memory loss (Blackburn et al., 2010). Conry and Fast (2009) reported that individuals who have memory deficits, along with challenges in communicating effectively might yield an unreliable police interview or testimony. Additionally, individuals with FASDs may inadvertently change their statement further invalidating their testimony, leading to false confessions and unwarranted punishment (Conry & Fast, 2009).

McBrien, Hodgettes & Gregory (2003) have found that 7% of individuals with intellectual disability are incarcerated due to breaches in their probation orders. Individuals with FASD who experience challenges with memory in terms of remembering to attend court or meeting with their probation officer can result in being charged with breaches in probation for not attending court dates or scheduled probation appointments, further perpetuating their involvement in the justice system as offenders. Implementing accommodations that address issues in memory can help to support this population through the justice system, resulting in easier access to justice.

**Suggestibility.** As stated previously, individuals with FASDs often have the desire to please others and can sometimes be vulnerable to manipulation (Fast & Conry,

2009). These features of FASDs can be a potential challenge for an accused when being interviewed by police. As reported by Henshaw & Thomas (2012), police officers encounter challenges when questioning individuals with disabilities. The study revealed that police officers found it difficult to communicate with individuals with disabilities and were unsure about how to modify their interviewing techniques to foster effective communication between themselves and the accused with the disability. Similarly, Agnew, Powell and Snow (2006) conducted a study that examined the ways in which police officers interviewed children with intellectual disabilities. The research statistically found that police officers sometimes use leading questions when interviewing individuals with intellectual disabilities. In addition to asking leading questions, only 14% of the police officers within the study provided the child with positive encouragement during the questioning. Without positive encouragement an individual with FASDs may alter what he or she is saying due to the desire to please the interviewer (Novick-Brown et al., 2011). Similarly, research by Clare and Gudjonsson (1993) found that individuals with intellectual disability are more likely than persons with an absence of an ID to be susceptible to leading questions by police during interrogation. An additional study by Clare & Gudjonsson (1995) found similar results where individuals with ID are easily suggestible to leading questions and more likely than individuals without an ID to provide a false confession.

Suggestibility during police interrogation or testimony can result in the accused providing false confessions. The use of unintentional leading questions by police officers as well as a suspect's desire to please others can influence an individual with FASDs in providing false confessions (Fast & Conry, 2009; Moore & Green, 2004). According to

Moore and Green (2004), once a suspect confesses to a crime, police officers and prosecutors are often not motivated to investigate beyond the confession. This can often leave individuals with FASDs being prosecuted for a crime they did not commit. In order to prevent suggestibility and false confessions during interrogation, police officers must alter their interviewing techniques to foster valid and reliable communication between themselves and the accused.

### **Implementation of Prevention Measures and Specialized Services for Accused with FASDs**

The Canadian Bar Association (CBA) has recognized International and National legislation such as The Canadian Criminal Code and the UN Convention on the Rights of Persons with Disabilities. A Canadian Legal Conference by the Canadian Bar Association in 2010 highlighted, however the specific challenges individuals with FASD experience within the justice system and addressed the increasing need to implement specialized accommodations in order to support persons with FASDs through the justice system. As a result of this conference, the CBA developed a framework that outlines what accommodations and supports should be made available. It was suggested that resources should be provided to develop programs to prevent individuals with FASDs from taking part in criminal activity in the first place. It was recognized, however, that individuals with FASD are at higher risk of committing crime and modifications must be made at various stages of the CJS in order for persons with FASDs to access justice in a meaningful way (Canadian Bar Association, 2010). The CBA suggested early diagnosis of FASDs where possible, skills training involving education about managing their

primary disabilities, social skills, and understanding their human rights (see also (Chandrasena, Mukherjee & Turk, 2009; Paley & O'Connor, 2009).

In accordance with the CBA's suggestions, Bill C-583<sup>3</sup> (2014) has been developed to amend the Criminal Code to include the definition of FASDs. If passed, Bill C-583 will not only include a definition of FASDs but will also give power for judges to order an assessment of FASDs and consider FASDs as a mitigating factor during sentencing. Although there are accommodations available for individuals with a range of intellectual disabilities within the court process there must be specific and individualized accommodations available within the justice system for individuals with FASDs. It is important that individualized accommodations are developed and geared to the complex needs and challenges of this population and can address the issues associated with the primary disabilities they may experience through the court system such as impulse control, understanding abstract concepts, difficulty linking cause and effect, working memory problems and suggestibility (O'Malley, 2008). These suggested changes in the structure of the Criminal Justice System emphasize the importance of providing specific and individualized accommodations for this complex population. The following section will explore broad-based supports within the CJS for those with a range of intellectual disabilities, however it will be suggested, as highlighted by the CBA (2010) and Bill C-583 (2014) that more specialized accommodations need to be developed to effectively support persons with FASDs.

**Mental Health Courts.** Although standardized tools to increase early diagnosis and the development of various adaptive skills training programs are methods to reduce the likelihood of persons with FASDs taking part in criminal activity, some individuals

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<sup>3</sup> Bill C-583 (2014) has not yet been passed and is at the first stage reading.

will continue to come into contact with the law, and thus, experience challenges when interacting with various stages of the justice system and the key players within it. Mental health courts are specialized courts available throughout Canada that help to support accused with dual diagnosis throughout the court process. Mental health courts are provided for individuals with mental health issues as well as those who have developmental disabilities. There are a number of mental health courts available across Canadian provinces (Bloom & Schneider, 2006), although there have been recent suggestions for expansion (Mental Health Commission of Canada, 2012). They provide specialized accommodations that help to support individuals with dual diagnosis who are involved within the justice system (Slinger & Roesch, 2010). Mental health courts are more equipped than typical courts to deal with individuals with mental health issues and developmental disabilities. It has been suggested by Hornick, Paetsch, Bertrand and Jacobs (2008) that there is an increasing need for the development of specialized courts that have an in-depth understanding of FASDs, how to communicate with this population and how to effectively support them through the CJS. These specialized courts allow for alternative responses and sentences to be fashioned that address the diagnosis, whether it is strictly mental health issues or dual diagnosis (Slinger & Roesch, 2010). Although the Mental Health Commission of Canada (2012) has addressed the need to include more unique services to support accused, specifically with developmental disabilities, there is a greater focus on meeting the needs of those with mental health issues compared to those with developmental disabilities, such as FASDs.

**Dual Diagnosis Justice Case Managers.** Within Ontario, there is a limited number of Dual Diagnosis Justice Case Managers available to provide support to accused

with a dual diagnosis, who have both an intellectual disability and mental health issue. These service workers are responsible for guiding the individual through the various stages of the justice system including pre-trial, trial and post-trial. This includes ensuring the accused attends court dates, understands and completes court provisions and provides a support plan that assists the accused in complying with various probation orders (Bethesda, 2014). Similar to Mental Health courts, Dual Diagnosis Case Management focuses on dual diagnosis as opposed to individuals only with intellectual disabilities or with more complex groups such as FASDs. In addition, there is no empirical research that addresses the effectiveness of service workers in this capacity. Although there are support provisions that address the policies laid out in the Criminal Code of Canada (1985) in regards to support within the justice system, there continues to be a lack of accommodations and support that focuses on FASD more specifically. The development of unique support programs geared towards the specific diagnosis may help to reduce the recidivism rate for individuals who have FASDs because they address the specific needs and provide the specialized support needed to successfully accommodate persons within the CJS with the specific diagnosis of FASDs.

**Canadian Programs Supporting Accused with FASDs.** The FASD Youth Justice Pilot Project is an example of a program that specifically focuses on supporting individuals with FASDs who are involved within the criminal justice system as accused. This program is based in Winnipeg, Manitoba and was implemented in 2004. This program helps youth with FASDs receive an official diagnosis of the disorder, arrange training for professionals working with accused with FASDs, as well as provide recommendations to the court on appropriate sentencing for youth with FASDs. Research

on the effectiveness of this program was conducted between October 2004 and March 2006. Results showed that this program led to increased formal diagnosis of FASDs in the courts, enhanced professional training about the disability, as well as increased services, support and case management of cases involving youth with FASDs (Department of Justice Canada, 2013).

Similarly, the Lethbridge Community FASD Justice Project in Lethbridge, Alberta is a program that supports youth with FASDs who are involved within the justice system as accused (Department of Justice Canada, 2009). This project is supported on a provincial level by Alberta Children's Services (Department of Justice Canada, 2009). This program focuses specifically on supporting accused with FASDs through the court process as well as recommending appropriate sentences to the court in hopes to divert youth with FASDs from custody and back into the community (Department of Justice Canada, 2009). Specific programs geared to individuals with FASDs have the potential to effectively support accused with the diagnosis and ensure that the services provided such as these address the specific characteristics of the disability such as difficulty understanding the legal process or communicating with professionals. This can help to ensure persons with FASDs are able to access their right to equitable treatment within the CJS and receive fair sentencing.

**Modification of Interview Techniques.** As suggested by the CBA (2010), providing justice professionals with education and knowledge about the methods to modify the ways they interact with individuals with FASDs can be a way to ensure that persons with FASDs give the best evidence possible. According to Ericson, Perlman and Isaacs (1994), the concept of competency has been regarded as something that is static



and a trait that an individual either possesses or does not. This way of understanding and conceptualizing competency does not take into account the ways in which an individual's surroundings and support can influence proficiency. Ericson et al. (1994) argues that the modification of justice professionals' interviewing techniques and how they interact with individuals with developmental disabilities can be a way to enhance the competency of an accused, witness or victim.

Specific requirements can be put in place to ensure that justice professionals provide individuals with FASDs equal opportunity within the justice system. Griffiths and Marini (2000) suggest justice professionals carefully choose how they ask questions such as avoiding the use of leading questions. Ericson et al. (1994) have outlined strategies to communicate effectively with individuals with intellectual disability during the interview process. The suggestions include:

- Allow a support person to be present during the interview
- Make sure the interview is short in duration
- Inform the client that it is okay to say "I don't know"
- Use plain language to ensure understanding
- Do not use run-on sentences
- Ask one question at a time (p.5-6)

Although there is limited research that focuses on the services that are put in place for accused with FASDs, Jeffery (2010) discusses the specialized accommodations that are implemented in a court jurisdiction in the Alaskan Arctic for persons with FASDs. Similar to the suggestions of Ericson et al. (1994) and Griffiths and Marini (2000), Jeffery (2010) discusses the importance of addressing the challenges individuals with FASDs have through modifications to the court process. Jeffery (2010) has suggested

basic modifications to the court process that can address the challenges individuals with FASDs experience in CJS. The guidelines are as follows:

- Slow down the hearing to ensure understanding
- Take a break to allow the individual to process the questions
- Use clear and plain language and avoid legal jargon
- Simplify probation orders to include concrete language, avoid legal jargon (p.594)

These modifications can help to address the primary disabilities associated with FASDs such as challenges understanding abstract concepts, difficulties with memory and suggestibility.

**The Liverpool model of “Witness support, Preparation and Profiling”.** The Liverpool model of “Witness support, Preparation and Profiling” is an example of a holistic programme developed in the U.K by a social worker named Mark Pathak that addresses the challenges individuals with intellectual disabilities may encounter when involved within the CJS. This two-stage programme not only has the potential to adequately prepare individuals with disabilities for court but also prepares justice professionals for individuals with FASDs who are involved in the court process as a witness or accused (Pathak, 2010). During the “preparation stage” of the Liverpool model, individuals with disabilities prepare for court by taking part in various activities such as going to an empty courtroom as well as a working courtroom, multiple times. This allows for the individual to become familiar with the elements of the courtroom, the people within the courtroom and what will be expected. This can be a way in which to address the primary disabilities such as memory deficits for someone with intellectual disability and reduce any anxieties. This stage of the model can help the individual understand the process of CJS as well as help them to remember their role when in the

courtroom (Pathak, 2010).

The second stage of the model is the “Witness Profile Stage”, where a ‘Witness Profile’ is created that includes information about the individual for justice professionals who will be present in court. This stage of the programme speaks to the suggestions by Ericson et al. (1994), whereby some of the onus is placed on the key players in the justice system in ensuring individuals with disabilities receive equitable experiences. The information included in the profile can adequately prepare justice professionals for the most effective ways to interact with individuals with intellectual disabilities. This profile provides justice professionals with details about how to communicate effectively with the individual as well as any modifications that should be made to the court process. The ‘Witness Profile’ is based on the diverse needs of individuals that will help to provide valid and reliable evidence (Pathak, 2010).

Although the Liverpool model is not geared to the specific diagnosis of FASDs and is offered to individuals with a wide variety of developmental disabilities, the programme’s person-centered approach to support allows for the distinct characteristics of each individual to be addressed and supported.

### **Purpose of Present Study**

Despite recent research that reveals the challenges individuals with intellectual disabilities encounter when interacting with the justice system in a broad context, and a handful of suggested accommodations for persons with FASDs, there is a lack of empirical research that examines the accommodations that are currently available and needed in the justice system in Ontario to address the difficulties encountered by persons with FASDs more specifically. It is important to examine this specific population as the

primary disabilities associated with FASDs including impulse control, linking cause and effect, suggestibility and understanding increases their risk of false confessions, waiving their legal rights and other vulnerabilities when interacting with the justice system (Hamelin et al., 2011; Roach & Bailey, 2009) The current project represents an attempt to fill this gap in the literature. Unlike other research, the current study will examine the ways that accommodations and supports are being used to assist individuals with FASDs throughout the various stages of the justice system in Ontario.

First, it is important to examine the traditional legal accommodations currently used within the CJS for individuals with a wide range of intellectual disabilities. In addition, it is valuable to understand professionals' views about the range of formal and informal specialized supports they use within Ontario specifically for people with FASDs. The input by professionals is critical to determine the most suitable way to address the challenges individuals with FASDs experience within the justice system. More broadly, the interview data will be placed within a wide and theoretical context that includes conceptualizations of persons with ID as fully legal 'subjects' who are capable of exercising their constitutional rights just as other citizens without disabilities. Therefore the analysis will not only contribute to our understanding of accommodations and supports for persons with FASDs involved in the justice system, but also about how conceptualizations of persons with disabilities link to how they are, and can be assisted in the justice system.

**Research Questions:** This study aims to address the following research questions:

1. What do justice professionals and service support workers within community agencies perceive to be the most significant challenges individuals with FASDs experience when involved with the justice system?
2. How are accused with FASDs currently supported when interacting with the CJS?
3. What accommodations do working professionals believe would be beneficial in supporting accused with FASDs involved within the various stages of the Criminal Justice System?

## **Method**

### **Participants**

Participants included twenty working professionals (n=20). The range of participants included ten (n=10) social service agency workers, which included four directors of community programs, three behaviour therapists, two mental health workers and one psychologist. Participants also included ten (n=10) criminal justice professionals. This included four defence lawyers, one Crown attorney, one victim witness support worker and four police officers. Including professionals from both sectors who work with these individuals provided a variety of perspectives addressing not only the challenges that individuals with FASDs experience when interacting with the justice system but also, what is needed to support them in a legal setting. Participants from both sectors were chosen from a range of rural and urban cities located within South Central and Northern Ontario. Age and gender are not of central importance in this study and did not affect the outcome of the interviews.

Participants were recruited through convenience/snowball sampling techniques. The snowball sampling technique was employed to overcome the challenges that can sometimes be encountered in accessing busy justice and social service professionals for research. Initially, a professional or two from each classification who are known by the researchers were invited to participate in the study through an email invitation. Through volunteer and work experience within criminal justice settings and social service agencies, the researchers had built rapport with various working professionals who were potential research participants. Researchers did not have regular contact with potential participants, which mitigated against the possibility of participants feeling obligated to take part in the study. In order to further mitigate the possibility that potential participants felt pressured to take part in the study, they were assured within the letter of invitation that they were in no way obligated to take part in the research study, as well as within the consent form if they chose to take part. Once the initial interview was conducted, the researcher provided the participant their contact information and the details of the study to pass on to other potential participants, who could contact the researchers directly if they were interested in taking part in the study. This ensured that the contact information of potential participants was not given to the researchers without prior consent.

The setting of the interview was at the discretion of the participant. Due to various professionals' job demands and busy schedules, each interview took place at a date, time and location that were convenient for the participant. The interview was held in private offices or meeting rooms of social service and justice professionals. They were reminded in the letter of invitation and consent form to choose a quiet and private place to avoid being overhead, interrupted or have others voices recorded.

In-depth semi-structured qualitative interviews were conducted with the twenty participants. The interviews were mostly face-to-face with the exception of a few telephone interviews for the participants who were unable to meet in person. Each interview took approximately 1 hour in a setting predetermined by the participant. Each interview was digitally recorded to ensure accuracy and was transcribed by the researcher.

The in-depth interviews addressed participants' perspectives of the experiences of individuals with FASDs at various stages of the legal process, including pre-trial, trial and post-trial. Interviews also focus on what accommodations, if any, are being provided for individuals with FASDs within the justice system as well as suggestions for specialized support that working professionals believe should be implemented within the CJS for individuals with FASDs. The use of in-depth semi-structured interviews allowed for the interviewer to ask specific questions as well as enable participants to expand on points they felt were beneficial to the outcome of the interview (Marshall & Rossman, 2011). This method was most appropriate because it allowed the participant to provide rich in-depth information about their experiences working with individuals with FASDs.

The researcher asked a range of interview questions that addressed both theoretical conceptualizations of those with FASDs, including how the disorder is understood, its relationship to the commission of crime, legal rights, as well as practical questions about both formal and informal accommodations currently available and needed to effectively support this population throughout the CJS (for a complete list of interview questions please see Appendix A). A sample of the range of questions asked is provided below:

- A. Is the justice system effective in ensuring that the rights of persons with intellectual disability are upheld? Why or why not?
- B. How much responsibility do you think should be placed on the laws, policies and structure of the justice system to support those with FASD and other intellectual disabilities?
- C. Are there formal, specialized accommodations or supports laid out within the legal system that are made available for individuals with FASD when involved with the CJS?
- D. In what ways could the experiences of individuals with FASD be made better when interacting with the justice system?

Two hypothetical case scenarios were also provided to participants along with various questions that addressed the challenges individuals with FASDs experience within the CJS as well as suggestions for support. The two hypothetical case scenarios are provided below:

*An individual with FASD was charged for assault after being dared by a friend to get into a physical fight with a neighbour. The assault resulted in the neighbour suffering broken ribs and a broken nose. During interrogation, the police officer asked the individual with FASD questions about their role in the offence and the specific details of the assault. The individual had difficulties remembering the details of the crime and struggled answering most of the questions asked. The police officer continued to interrogate and question the individual until he became extremely agitated and hostile towards the officer.*

*A man in his mid-thirties is at home on his computer and comes across an internet chatroom. He begins talking with a young girl in this chatroom. During this conversation he asks the girl to go on webcam and take her top off. He says he will take off his clothes on webcam if she does. A while later, police come to his door to arrest him. During police interview, the officer asked the individual with FASD questions about why he was talking to underage girls in this chatroom. The individual's answer was: "I thought if I showed them what I have to offer I could get a girlfriend." During questioning the individual responded yes to every single question asked by the officer and became increasingly upset, beginning to yell at the officer asking him to stop.*

The hypothetical case scenarios were included in the interview process in order to elicit more in depth responses from participants in terms of the relationship between how professionals think about/explain the challenges faced by persons with FASDs, and what



can be done to support them effectively. Participants were asked questions in terms of how FASDs played a role in the offence and how the court could respond to assist the individual with FASDs in providing their best evidence in order to access their right to justice. These case scenarios were followed by more general questions about FASDs and the justice system, consistent with the research objectives. The structure of the interview was meant to understand professionals' views within the context of specific case facts and whether those views were consistent with their more general views.

### **Informed Consent**

Prior to taking part in the interview, each participant read, understood and signed the provided consent form given to them by the researcher (see Appendix C). Each participant signed two identical consent forms. The first consent form was for the participant to keep and the second consent form kept for the researcher's records. The consent form outlines the rights and responsibilities of the participant, such as the right to be fully informed about the purpose of the study, the right to confidentiality as well as the potential benefits and risks to taking part in the study. In order to ensure confidentiality of working professionals and the agencies they work for, questions were not be asked about specific cases or individuals.

For telephone interviews, the consent form was emailed to the participant the day before the interview. The participant was asked to read and review the attached consent form in order to understand their rights and responsibilities. A verbal consent process was sufficient and was documented through audio recording. However, the participants who did not feel inconvenienced scanned and returned the consent form via email.

Following the completion of the study, each participant was provided with a summary of the results. The summary was completed approximately two months following the completion of the data collection. The summary included information about the purpose of the study, the procedure and preliminary results. The summary was sent via email.

Although there were no participants who chose to withdraw from the study, each participant was informed before the interview that withdrawal from the study was possible at any point in time, without any repercussions or consequences. Participants were reminded that if they chose to withdraw from the study during the interview, the audio recording would be deleted immediately and therefore their answers were eliminated. Additionally, the participants were informed that if they withdrew from the study after the completion of the data collection their data would be removed from the study. The participants had access to the researcher's contact information in case they wished to withdraw from the project and the data could be removed immediately.

### **Confidentiality and Anonymity**

All participants' were guaranteed confidentiality of the information they provided during the interview. However, given the possibility that participant quotes will be used in publication, steps were taken to ensure that the quotes cannot be linked to individual participants. When providing quotes, the only identifier was the general profession of the participant such as behaviour therapist, lawyer or police officer. To ensure anonymity of the data, no personal characteristics were given, such as the specific place the individual works or specific job titles. This ensured that no personal identifiers compromised the identities of participants. Participant identifiers were removed once the data collection

process was completed, such as specific job titles or specific job locations. All personal identifiers were destroyed immediately after the transcription and release of data.

Due to the use of snowball sampling and participants' providing researchers contact information to potential participants, anonymity may be compromised. This was resolved by the fact that the nominator did not necessarily know whether or not the person that they gave the details of the study agreed to participate. In the transcription and release of the data, all personal identifiers within the data were removed. All written transcripts and recorded interviews were stored in a locked cabinet or drawer in the Justice and Intellectual Disability laboratory at Brock University. All computers holding the data were protected with a password. Data will be retained for publication purposes for five years after completion of the study.

### **Data Analysis**

Grounded theory helped to inform the data collection within this research study. Grounded theory aims to generate a theory based on the collection of the data itself. A theory is derived through the perceptions and views of the research participants (Corbin & Strauss, 2008; Creswell, 2007). According to Creswell (2007), participants experience the phenomenon being studied, which can result in the development of theory, informing both practice and future research directions. For the purposes of this study, however, the coding techniques associated with grounded theory were used to inform the results, as opposed to developing a theory itself.

The data were coded by hand. Open and axial coding were both used in order to facilitate the emergence of more general and specific themes throughout the interview process. During the open coding phase, major themes were formed that helped to

distinguish central themes from subthemes that emerged from the data collected.

Following this phase, axial coding was employed. As mentioned by Creswell (2007), this stage of the coding process identifies the “core phenomenon” being studied and position sub-themes around the phenomena. The themes were discussed with the supervisors of the research and examples of quotes and their codes were addressed during these discussions for feedback.

Overall, the research is meant to enhance our understanding of the experiences of professionals who interact with individuals with Fetal Alcohol Spectrum Disorder within the justice system, as well as the challenges they often encounter when interacting with the CJS. Gaining a deeper understanding can enhance the support both professionals and individuals receive within the justice system in accordance with the right to equitable experiences within the justice system for individuals with disabilities as laid out in the UN Convention on the Rights of Persons with Disabilities (2006). Moreover, this research may further support justice and social service professionals in the need for the development of various programs and workshops geared towards educating working professionals on the specific diagnosis of FASD and effective ways in which to support them through the court process. In addition, this study can inform future research about the ways to not only prepare individuals with FASDs for court, but to also prepare justice professionals and the system for those with FASDs.

## **Results**

The results section outlines the themes and patterns that were developed based on the interview questions relating to the interviewees’ perceptions of the challenges and accommodations available within Ontario court’s for individuals with FASDs. When

participants were asked about their understanding of FASDs, a commonality emerged in conceptualizing FASDs through both environmental and biological factors. Fourteen out of twenty participants from both sectors highlighted that a mother drinking alcohol while pregnant causes FASDs. Although participants highlighted this factor as the fundamental cause of FASDs, they also emphasized biological aspects of FASDs that cause cognitive and behavioural challenges for this population. When participants were asked what their understanding of FASDs was, they also highlighted that FASDs is a varied spectrum (n=6) that can cause permanent brain damage (n=4). In terms of cognitive and behavioural features of FASDs, eight out of the twenty participants also conceptualized FASD in terms of their impulsivity, while four participants highlighted challenges with understanding. This 'biological' perspective was expanded to a more holistic understanding of FASDs as participants were asked questions around hypothetical case scenarios and more general questions. It appears from the responses, overall, that professionals understand that the justice system can impose barriers on persons with FASDs, and that the disorder has an impact on an individual's emotions and interactions with others. The biopsychosocial perspective underlined and influenced the participants' responses.

Five overarching themes were found in this research study: (1) Awareness, Training and Education (2) Identification (3) Challenges in Understanding, Memory and Suggestibility (4) Legislative and Structural Changes and (5) Multidisciplinary Accommodations (see Figure 4). The following section will examine these five themes in greater depth, generally following the order of the interview questions.

## **(1) Awareness, Training and Education**

This theme involved the lack of awareness, training and education of FASDs by professionals in terms of the characteristics of the disability and how to effectively support them through the Criminal Justice System. The findings demonstrated a need for increased education and understanding of FASDs and the ways to support individuals with FASDs through the court system. More specifically, this theme examined the differences between social service agency workers and justice professionals in terms of the training they have received about FASDs.

Three questions were asked about the professionals' understanding of FASDs and the nature of any education or training they may have received about FASDs. Findings showed that professionals in the social service agency had received more education and have a greater awareness of FASDs compared to justice professionals. Every social service agency worker reported being offered training about FASDs (n=10), while only twenty percent (n=2) of justice professionals interviewed have been provided education and training about the FASDs spectrum. For example, one mental health worker (P8) stated, "I think I got more training offered in the more treatment facilities that I work at as opposed to the legal system that I worked in". Although it was mentioned that some justice professionals have heard of FASDs more broadly, two justice professional respondents argued that justice professionals, on the whole, do not have an adequate understanding of the intricate nature of the behaviours associated with FASD and how these characteristics influence an individual's choice to take part in crime. In terms of justice professionals having a very basic understanding of FASDs, one behaviour therapist (P7) argued that justice professionals lack an in-depth understanding of the

specific characteristics of FASDs and the role it plays in individuals getting in trouble with the law. She stated:

Well I think they should be aware of what FASD is and I think a lot of times in the court systems people aren't aware of it. They have heard the term, the defence lawyers as well as the Crown attorneys and the judges know FASD, that it's caused by mothers drinking but I don't think they understand the conditions and the symptoms and the characteristics that go along with it. So they don't understand they just think the person's acting out because they are choosing to.

One police officer's (P20) comments stood out in relation to the lack of justice professionals' awareness of FASDs and the need for more understanding and training.

This police officer stated:

I think to be fair and true to them it's having somebody that can describe who these people are. I will be honest, I am ignorant to most of it other than yes they have a disability. But to say I understand it totally you know I don't. So I think the education um getting it out there would be important and would be a great start.

Interestingly, one significant comment by a defence lawyer (P12) highlighted that there appears to be less awareness and understanding of FASDs by professionals compared to other more well-known intellectual disabilities. He discussed how this had led to less available resources and supports for those with FASDs compared to the support that is available of individuals with other ID's:

There appeared to be a couple of people who do know things [about FASD] although compared to any other disability I have seen, uh the resources seem to me to be... I would say FASD is less well understood than any disability I can think of including autism and under-resourced relative to any other disability I have seen you know.

**A need for more awareness of FASDs in the justice system.** Although the findings show a relative lack of awareness and understanding of FASDs by justice

professionals, representatives from both sectors stressed an increased need for education and awareness of FASDs. Forty-five per cent of the participants (n=9) mentioned the need for more information about FASDs within the justice system. One director of a community program (P1) stated:

I think there has to be but that's a huge change. I think an awareness has to be, like right now I think that what has to happen is an awareness and understanding um of intellectual disability, mental health, FASD. Um those are all three components that impact on why decisions [to commit crime] are made...I really do think that those are the areas that have to have a lot more concentrations hopefully laws and policies but just an awareness. It's not there right now.

Similarly, one defence lawyer (P14) spoke to the need for more awareness and training for justice professionals about FASD, resulting in more effective solutions in supporting individuals with FASDs who come in contact with the law:

It would certainly be a good idea to have more training and awareness of it. I mean I haven't really um... I remember being you know remember it being a hot issue you know about 15 to 20 years ago when I learned about it and I haven't really heard anything about it since then. So it would be as I understand it, it's diagnosed in a real significant number who are in constant trouble with the law and incarcerated so it seems to me that it's certainly a move we should be looking at for more when we come across someone who doesn't seem to be able to behave themselves and have more um training especially for judges and police officers and Crowns as well. I think more training on what are you know... what can be done for these people apart from throwing them in a hole.

**Training for Professionals.** Every professional who had been provided education and training reported it being beneficial in gaining more awareness and understanding of FASD (n=12). When one police officer (P17) was asked if he found the training and education he had on FASDs to be beneficial he stated:



Yeah of course. Uh any training we can have at the front lines of policing in regards to when you are dealing with people um with certain disorders is obviously beneficial. The more training that we can have to deescalate situations the better. The more things we learn where we you know, certain things not right to say, certain things not to repeat is obviously best for public safety and officer safety. So any training that we have is beneficial.

Social Service agency workers also stressed how beneficial training and awareness of FASDs can be for the professional and the individual with FASDs. Similar to the police officer, a director of a community program (P1) specifically stated, “this sub committee I sat on was very beneficial”. She mentioned the importance of having trained ‘experts’ provide training about FASDs. One mental health professional (P8) stated, “we had professionals coming out and clinicians that were trained and specialized in FASDs. I think that’s important”. These comments point to the importance of having training programs available that specialize in FASDs provided by experienced professionals in the field.

Although participants found the training they received in the past to be useful and beneficial in supporting them in their line of work, 70% of the participants (n=14) mentioned a need for more in terms of awareness, education and understanding of FASDs. When professionals were asked what could make training more effective, professionals from both sectors highlighted the need for training to include more general education about FASDs, have the training geared to the specific profession, and provide practical solutions for support.

When discussing what is needed to improve training about FASDs six out of the twenty participants mentioned that there needed to be more available information about

the spectrum of FASDs and the various behaviours associated with this disability. One behavior therapist (P6) stated:

Right, for me it's about understanding, it's going to be a mixture of stuff. It's certainly going to be the medical stuff about what the direct consequence of damage to an individual's brain. So there's going to be medical stuff. umm...that medical stuff will have you know impacts on people's cognitive skills, people's language, people's use of nonverbal behaviour, people's way of understanding things, you know the way people understand, express, you know its going to be what's the medical issues, what's the physical damage that has an impact on an emotional and interpersonal level. That's what I need to develop and there is stuff out there. There's medical research that talks about processing and you know and reasoning and thinking things through and that sort of stuff and consequences and all that sort of stuff.

A police officer (P19) mentioned the need for more information about what challenges individuals with this disability may encounter due to the primary disabilities associated with FASDs:

I think just more information. Most people don't really know what it is. They know the basics of what it is, how it happens but as to the end results... I think a lot of people are not informed as to what the end results are and like the array of behaviours.

In contrast to the professionals who believed that an increase in education about FASDs more specifically is needed, one police officer (P17) expressed the challenge of training for one specific disability:

Well... there's so many different ailments out there that we can't, we can't train for every single one um you know policing is very you know is quite demanding as far as our training we have to complete every year, so it has to be somewhat generalized in our training. We can't specifically say for these type of people we need more training than this. I don't know the number of people that are affected by this disorder so you know the main ones that we run into are schizophrenia, you know people with just bad depression,

anxiety and you know the whole gamete so you know we have to do things that are more generalized. We can't specifically train for one disease.

This officer pointed to the practical limits on training for FASDs specifically, including time and presumably resources.

The findings show that professionals from both sectors suggested a need for the training provided to professionals to be geared to the specific profession within the audience. One director of a community program (P2) said that the trainer should “know who the audience is” in order to ensure that the information being shared would be beneficial for these professionals when supporting individuals with FASDs, whether it be through agencies within the community or within the justice system. More specifically, the Crown attorney (P15) mentioned that: “it would be best if the training were more criminal justice specific as opposed to sort of support social work specific”. Similarly, one behavior therapist (P1) also highlighted the importance of providing more specific training related to one's profession:

If we are looking specifically improving training um, I think just tying it in the specific field and the specific field anyone's doing. So for me, how does FASD impact um things like age discriminations, sexual preference, ability to regulate um hormones, understanding consequences? Really fine tuning and directing to the service providers your speaking to.

A pattern that emerged within both sectors in terms of improving training was the need for training that addressed practical solution-based strategies to support individuals with FASDs when involved within the court process (n=4). One director of a community program (P3) discussed the need for the development of new programs to support those with FASD and that “maybe more advancements in actual kind of programming that we

use would be key”. Similarly one director of a community program (P4) spoke about how it is not enough to learn about the challenges individuals with FASDs experience but justice professionals need to be educated on effective ways to support these challenges within the CJS:

Yeah so I think one thing is having practical solutions but there are other issues which is having resources which we often have people in the justice system... okay I know this but what do I do? Um you know I've worked with this client and I think their behavior suggests to me they may be affected by FASD. I spoke to the mother and she told me she drank when she was pregnant, um so now what do we do? Where can we get this person diagnosed? What can we do for this person because short of diagnosis is it fair to operate on the assumption someone has FASD? Is that a useful thing to do?

Interestingly, one defence lawyer (P13) suggested that training should start off very generally, providing more basic information about FASDs, followed by a more realistic discussion about where professionals can bring cases forward to brainstorm ways in which to support them effectively throughout the CJS and ensure they are able to access their right to a fair trial. The defence lawyer (P13) stated:

So make it available. Umm... something that can be... that different levels of detail are available, because you might want to start off with something a bit more general and ending on a case that is relevant for you might want to get more detailed information. And just have resource people available to perhaps talk about particular clients with.

## **(2) Identification**

This major theme revolved around the lack of formal identification of FASDs within the Criminal Justice System. The in-depth interviews revealed the challenge professionals experience in knowing where to go to get an individual diagnosed who they suspect has FASDs. When participants were asked, “how are persons suspected with

FASDs or any other disabilities identified within the justice system?”, some professionals mentioned that often times, individuals with FASDs go through the justice system without ever being diagnosed (n=6). A significant statement said by a defence lawyer (P12) demonstrated how many individuals with FASDs can go through the justice system without ever being diagnosed and being provided the necessary accommodations to be supported effectively. He stated, “I mean I can’t imagine how many people are down in Ontario court, criminal... sitting up in front of a judge pleading guilty or not guilty have fetal alcohol and nobody knows it, the Crown, the defence lawyer doesn’t know”.

When participants were asked, “what do you think are the central challenges or issues for accused with FASDs when interacting with the various stages of the court system?” seventy per cent (n=14) of the participants highlighted the lack of formal identification of FASDs within the justice system as a significant issue within the CJS. Many respondents articulated the expected and unexpected consequences of this pattern. One defence counsel (P12) offered a strong statement about the realistic and expected implications of undiagnosed cases of FASDs: “if it wasn’t diagnosed um at the time of entry of the justice system the person’s not going to come out diagnosed... they are going to come out sentenced and treated as if they didn’t have fetal alcohol, as unjust as that can be.” One director of a community program (P4) emphasized how a lack of identification of FASDs results in the rights of those individuals not being protected. This participant stressed that if professionals are unaware of the disability they are unable to accommodate and support:

First of all you have to know that someone has intellectual disability, that information just rarely gets before the court, so its hard to protect someone’s rights if you don’t know there’s a problem... So uh so for most part, people they won’t have any

idea they have an intellectual disability so it's impossible to take it into account.

Participants from both social service and justice sectors (n=10) mentioned that a significant challenge for justice professionals was knowing where to go to get a client identified as having FASDs. For example, one defence lawyer (P11) mentioned, "there's not resources to have people tested and I mentioned earlier if you can't get a hold of the mother how do you properly diagnose?" Additionally, one director of a community program (P3) discussed the challenge of accessing a diagnosis and by default, no concerted efforts in doing so. In many instances if the professional *suspects* the individual has FASDs then on that basis alone it could lead to the individual being supported accordingly. This participant explained:

I know that we don't even try and get them diagnosed because there really is no, there's no avenue to do that. With proper people, I know there is a handful of doctors who do it but between the cost and everything we just assume they have it. If they have all the signs you know they have that borderline intellectual um ability they're making poor choices, you know if it's a female and they are promiscuous I say just assume, it's not going to [change] how you would support someone with FASD. And if they don't have it, it's still a good thing to support.

While one might expect that only a formal diagnosis would lead to supports, the view of this professional challenges this assumption. The professional suggested that having a clear understanding of the range of behaviours associated with FASDs can lead to supports.

**Identification through past assessments.** Professionals from both social service agencies as well as justice professionals reported that FASD is only acknowledged within the CJS through justice professionals' ability to access their clients' past assessments (n=5). One director of a community program (P3) mentioned that in most cases the

individual would only be identified as having FASDs if it is brought to his or her attention through the referral. It was also highlighted that very rarely professionals will work together to have an individual identified with FASDs. In terms of how an individual is identified, this professional (P3) stated, “either historically, experientially, other assessments or reports that have been identified on the referral. We get the acknowledgement of it in that rare circumstance where you have suspicion and we work in collaboration with the broader system and network of services.”

**Self-identification.** A minority of the participants (n=6) also noted that an individual’s disability came to their attention only if their client self-identified as having fetal alcohol spectrum disorder. For example, one police officer (P17) stated that “the only way I would know would be by self admission”. Similarly, a psychologist (P10) said that, “I imagine if they have a diagnosis when they came into the Criminal Justice System they would self-identify.” One police officer discussed how the only way they find out if a person has FASDs is if they disclose their disability to the officer. It is also important to note that during the initial intake and assessment, the police officer would ask the accused if he or she had any disabilities. The police officer stated:

I want to say tell us... umm that’s basically it. Like some of them will come out and tell us that they have some sort of disorder. Like some of them I don’t know if that’s the counseling they have received to identify that. So some people will come out and say that they have a mental disorder or they have a certain illness that we should be made aware of. But we ask that question every time too. Do you have any injuries or illnesses is one of the questions that we ask at every intake but it’s up to them to tell us.

Interestingly, two defence lawyers mentioned that the only time an individual is identified as having FASDs within the court process is when the crime is serious and

warrants a psychological assessment. The first defence lawyer (P13) mentioned that, “often we don’t have the resources available to actually do the kind of analysis to determine whether FASDs is a factor. On a very serious case um like a homicide or something like that if there is going to be a guilty plea there may well be a kind of background done that would determine that”. Similarly, the second defence lawyer (P11) stated:

Unfortunately, um they’re identified through my experience mostly through defence counsel and often times it’s only when they have committed something very serious where a psychological workup can be done or to look into third party records such as family and children’s services. But that’s only when somebody has been charged with something really serious.

**Increase in youth identification.** A minor theme emerged about the increase in identification of youth with FASDs (n=3). One director of a community program (P2) spoke to the development of youth court and its role of the increased identification of youth with FASDs. The participant (P2) stated:

The youth court mental health worker... So part of what she does is identify people who have potential learning disability, potential mental disorder and fetal alcohol and then she refers to the um to the physician, the psychologists whoever would be best suited to make that diagnosis. Umm... before that happens and she’s only one person, umm I don’t know that it was, unless it was a high risk offender and the courts ordered a Section 34 [YCJA], would there be any systematic approach to identification.

The findings show that there are more services put in place to support youth within the justice system in terms of assessing and identifying intellectual disabilities than for adults suspected of FASDs. For example, one director of a community program (P3) stated:

I don’t think there are all the safeguards that are put in



place for youth, so I do think that they [adults] are more likely to slip through and not be identified... the adult system doesn't seem to me to have evolved as much as the youth system has.

This director of a community program (P3) went on to explain that, “ I don't see the same level of intervention happening. People aren't pushing necessarily to offer that. I think its there if its sought. But I don't know if its presented quite the same as it is with the youth level where it is pushed forward.” These findings show that getting adults suspected of FASD identified within the CJS is not as likely as identifying youth within the justice system who may have the disability.

Similarly, one defence lawyer (P14) spoke to the idea that justice professionals look for a diagnosis of a disability when an individual is a youth, however when they reach age 18 professionals are less likely to consider a disability as a potential factor in the individual taking part in crime. The defence lawyer (P14) said:

When they are kids... when they are in the youth system um judges do tend to give them um you know take into account the fact that much of their behavior is either beyond their control or difficult for them to control because of things that are actually not their fault um but you see it a lot less once they become adults um especially if they are committing violent offences and I don't often see that diagnosis anymore when they are adults. It seems to be something that you know they look for when they are under 18 but then when they get into the adult system you so often see um the professionals looking for that diagnosis or making that diagnosis and you know even as far as I understand it, it's you know that's pervasive throughout your life and it affects you permanently. And they are much less forgiving of that kind of behaviour when they reach the adult system.

This finding shows that justice professionals may not always perceive identification as being their priority and main responsibility, further highlighting a gap in identification within the adult system in the CJS.

### **(3) Challenges in Understanding, Memory and Suggestibility**

This theme pertained to the participants' perceptions of the most significant challenges they believe individuals with FASDs face when they were interacting within the justice system. Questions were asked such as: "what is your understanding of Fetal Alcohol Spectrum Disorder" and "what do you think are the central challenges or issues for accused with FASDs when interacting with the various stages of the court system". Justice professionals and social service agency workers provided three challenges that affect persons with FASDs and their participation within the criminal process:

**Understanding.** The most significant theme that emerged in terms of challenges individuals with FASDs face within the justice system was their understanding of abstract concepts. Both social service agency workers and justice professionals believed this to be a main challenge individuals experience when involved with the justice system (n=16). Participants highlighted the confusion that many individuals with FASDs experience when navigating their way through the court process in terms of understanding the complex nature of the CJS, the roles of various justice professionals, what their role is as accused victim, or witness, and how to access support. For example, one director of a community program (P3) explained "the challenges can be understanding what their options are". Similarly another director of a community program (P2) stated:

Well the challenges can be understanding, what their options are or what it is they think, what is they think they are being accused of, what their options are, what's in the system to protect them and to support them through it. That's um different... I think... you know kids with fetal alcohol it would be even more challenging to figure out the nuances of all the different players.

A victim witness support worker (P16) highlighted the intricate nature and complexity of justice system and how, without support, it can be extremely difficult for individuals to have an adequate understanding of what is expected of them in terms of dealing with their court matters. She stated:

Well I think it's complex, like I said. Especially if they don't have any support navigating the system. I mean things like applying for legal aid. Sometimes educated accused have a hard time figuring out okay where do I go? How do I fill out these forms? And the things that they have to get together to qualify. So that's all very cumbersome.

Almost half of the participants went on to discuss the specific challenge of individuals with FASDs understanding the consequences of their actions (n=9). Both social service agency workers and justice professionals were in agreement that this is a significant difficulty that individuals with FASDs encounter, subsequently causing a high rate of recidivism for many individuals. One Crown attorney (P15) said, "they may not understand what jeopardy they are in and that they could go to jail". Similarly, a mental health worker (P8) pointed out the challenge individuals with FASDs have in learning from their mistakes, leading to high rates of them reoffending. She mentioned:

Given the nature of the person with FASD, they are not able to understand how their actions can lead to consequences. Rate of recidivism is huge because they don't understand how serious their actions are. They may know what's going on but they don't understand. So they are more likely to repeat those mistakes.

One significant comment by a police officer (P20) encompassed the challenges individuals with FASDs experience in regards to both the complexity of the CJS as well as the difficulty grasping the concept of consequences. When asked "What do you think

are the central challenges or issues individuals with FASDs when interacting with the various stages of the court system?” he stated:

Probably a lot of confusion. I mean if they're not functioning at a full functional capacity I would think there would be a lot of confusion as far as I mean I have been doing this for 18 years and there's times when the legal jargon happens and I have a hard time following it right? You know the old lawyer talk right? So I would tend to say that probably a lot of confusion in actually understanding what's happening. If they even understand you know the severity or you know the consequence of even their action right? So you know if you don't even understand the severity of why you're there then you know that would create a problem right. That whether you think you did right or you did wrong. You know... umm well even being fit to stand trial. You know umm if somebody's mental capacity is much less than you know... whether they understand or not. And if they even have the capacity to express or the knowledge to say hey I don't understand what's going on. Sometimes we even have a hard time admitting we don't understand something and they might not even have the know about to do that.

**Memory.** Findings showed that participants believed memory to be a significant difficulty experienced by individuals with FASDs in the justice system. A number of participants (n=8) touched on the challenges individuals with FASDs face in remembering important appointments such as meeting with their lawyer, going to probation or attending court dates on time. For example, the victim and witness service support worker (P16) highlighted this as a challenge and suggested a need for someone to write down the date for them as a reminder of their next court date. She stated that, “people with fetal alcohol they leave court and its like they turn around, what was that date? So you know maybe having um something that um they can take back with them that you know this is your court date.”

In addition to experiencing difficulty remembering appointments and court dates, one director of a community program (P2) highlighted the difficulty individuals with

FASDs have in retaining strategies they have been taught in terms of staying out of trouble and away from crime. He said:

They are generally very agreeable to participating and can often give meaningful responses and insights, however what they apply once they leave the facility is usually very lacking, so its getting them to retain and utilize that information [to stay out of trouble] past one meeting.

**Suggestibility and vulnerability to manipulation.** Throughout the interview process, the theme of suggestibility emerged from a small number of participants. When asked about what they believe to be the central challenge individuals with FASDs experience when involved within the CJS, one behaviour therapist (P6), one mental health worker (P8) and one defence lawyer (P12) highlighted that individuals with FASDs were vulnerable to manipulation to taking part in crime and could be led by police during the interview process. One mental health worker (P8) emphasized this when discussing how individuals with FASDs can be easily led by a police officer during questioning to admit to crime they did not commit. She stated:

So questioning the person with FASD, I think it's very difficult because they will admit to crimes that they have not committed. They may be suggestive [police officers] and they might incriminate themselves [persons with FASD] because they don't understand the seriousness of how they are answering questions.

#### **(4) Legislative and Structural Changes**

This theme emerged as an in depth examination of participants' perceptions of the legal rights of those with intellectual disability and how those rights are upheld within the justice system. When participants were asked, "is the justice system effective in ensuring that the rights of persons with intellectual disability are upheld?" fifty percent (n=10) of

the participants highlighted that the rights of individuals with intellectual disability are often not met within the justice system, which results in these individuals not receiving the support necessary to meet their individual needs. In the previous section participants acknowledged the challenges individuals with FASD often experience within the CJS due to the nature of their disability. The findings in this section shed light on how adjusting the structure of the justice system to an environment that is more accommodating and supportive would result in the needs and challenges of individuals with FASDs and other developmental disabilities being addressed more effectively.

The majority of social service agency workers (n=7) emphasized that the justice system has not been effective in ensuring that the rights of those with intellectual disabilities are upheld. One social service agency worker (P8) highlighted that they were unsure about whether or not the rights of persons with disabilities are upheld in the CJS. In contrast, a significantly smaller proportion of justice professionals felt that the justice system has not been effective in ensuring that the rights of those with intellectual disabilities are upheld (n=4).

Interestingly, one of the behaviour therapists (P7) did mention that although he felt the CJS is effective in ensuring their rights are upheld, the justice system tends to treat everyone the same, which could in fact be a rights violation. When asked about whether or not the rights of those with disabilities are upheld in the CJS, she stated:

I think so... I think that is the one area that the criminal justice system they do look at the rights of people but they code them in the same sections as everyone else so they... I don't know if that's a rights violation or just a lack of accommodations.

Similarly, one defence lawyer (P13) also discussed how individuals with intellectual disabilities have been often treated the same as others within the justice system which can be a challenge in terms of navigating their way through the complex and confusing system. He said:

The justice system treats, tends to treat everybody with the same brush, the same way... There is potentially maybe a little bit of help for people with intellectual and psychiatric difficulties but just like the real world, justice sees the system as much easier to navigate if you are smart, if you are normal then it is if you have any form of disability.

It is important to note that of the nine participants who felt that the justice system was effective in supporting those with intellectual disabilities. However, four of these participants highlighted that although the justice system did their best to uphold the rights of those individuals with intellectual disabilities rights, more must be done to in terms of supporting them. When asked, “is the justice system effective in supporting and accommodating persons with intellectual disability in the court process?” one police officer (P18) said that, “I think that they [justice system professionals] could do more. That’s what we struggle with”. The Crown attorney (P15) expressed that whether or not the rights are upheld for individuals with ID varies. He emphasized that, “I think it [justice system] strives for that, whether it’s always effective I suppose it’s on a case by case basis.” A comment by a director of a community agency (P2) underlined the idea that although the CJS does its best to support these individuals, without justice professionals’ understanding of intellectual disability their rights cannot always be protected:

No. Umm I was going to say I think the justice system probably umm means well but I guess if you don't really understand... you know the different challenges that can come from a learning disability, from fetal alcohol, from anxiety disorder whatever it is, it's hard to really umm have the rights... to be totally respectful of their rights.

A powerful quote is highlighted relating to one defence lawyer (P12) that reflected the challenge individuals with intellectual disabilities sometimes have in accessing their right to justice in a fair and equitable manner. He said:

So it's a reality of the way that the justice system is structured that most people have rights that are theoretically the same. Law applies to both the rich person and the person with an intellectual disability except you can do whatever you want with a person with an intellectual disability and no one is going to do anything about it.

**The CJS is not structured to support those with FASDs.** When participants were asked “how much responsibility do you think should be placed on the laws, policies and structure of the justice system to support those with FASD and other intellectual disabilities?”, the findings show that thirteen of the twenty participants from both sectors felt that the structure of the justice system is not effective in supporting those with intellectual disabilities more broadly (n=13). For example, one director of a community program (P4) emphasized that, “I think there are things that can be done uh to change the way the system works but it's the system itself [that] is not designed well for people with intellectual disabilities especially those people who have not been identified.” One behaviour therapist made a significant comment that the justice system is an institution built on tradition and it is often difficult to change a system that has been operating a certain way for so long. He stated:



The justice system is very old it's based on history, it's evolved and developed over time. It's an experienced system that has a lot of history. And often people make decisions based on history. And I think from that respect I think it's not prepared because it's not willing to... it's not willing to understand disability, right?

The behaviour therapist (P6) went on to explain that developing and implementing accommodations to support those with FASDs and other intellectual disabilities did not mean changing the laws itself but altering the process of accessing justice. He said:

It's got traditions, it's got processes that have worked for other people and we're just saying we want slight change, just a slight change in the playing field. And it's not changing the basis of law, which is out in Canada everyone's entitled to a fair trial. And you are innocent until proven guilty. So it doesn't alter the basis of law.

Another finding reveals that a major challenge within the justice system for those with FASDs is not learning from consequences, leading to higher recidivism rates for this specific population (n=9). The challenge of not learning from past mistakes and consequences relates to one police officer's (P20) comments in terms of how the structure of the justice system focuses on sentencing and how punishment may not always be the most effective way to address those throughout the justice system as opposed to implementing more rehabilitative sentencing options. He said:

I mean the responsibility is there that you know sometimes punishment isn't the best way to go. It's up to them to direct these people to the right path to get the help that they need. Perhaps its rehabilitation, treatment or the support. So I would say quite a bit. Cause if they didn't deal with it then they are going to be right back there whether it's a week later, a month after, 6 months later. And you know if they are at that point and the justice system is kind of like that last straw. If they don't make that decision to help these people then it's just going to be a continual cycle.

When asked how much responsibility should be placed on the justice professionals to support those with FASDs through the CJS, one police officer (P19) emphasized that until the structure of the CJS is changed and more programs are implemented to accommodate those with FASDs through the court process, there is a limited amount of ways justice professionals can support these individuals:

Well there should be some form of responsibility but ultimately it should be the system itself that these kinds of uh programs or supports are in place for the professionals to access. If they are not there it doesn't matter what the professional does if the support is not there they can't access it.

One director of a community program (P4) spoke to how the structure of the justice system did not often allow for difference, subsequently making it difficult for individuals with FASDs to be active participants within the justice system in accessing their right to justice. He stated:

So it's this sort of uh quick merry it's not a merry-go-round but it's an assembly line actually is a better term, it's an assembly approach of justice which treats everyone as though they are cognitively aware and able to participate fully in the system which doesn't in fact reflect reality of FASD affected people so they're not dealt with properly.

A significant pattern in responses, relating to discussions about the structure of the justice system, was that judges are constrained by legislation, impeding their ability to structure more supportive sentences for individuals with intellectual disabilities (n=5). Both social service agency workers and justice professionals expressed this as a challenge in terms of the structure of the justice system. In fact, three social service agency workers discussed how judges are less able to fashion person-centered and supportive sentences for those with FASDs. One behaviour consultant (P7) highlighted this issue when stating, "well that would be because recently because of Bill C-10. Because of mandatory

minimum sentencing judges don't have any power to make accommodations for people with FASD unfortunately."

When asked what specialized support and accommodations could assist justice professionals in supporting accused with FASDs during the court process a mental health worker (P9) emphasized the possibility of a new and upcoming bill that would consider FASDs to be a mitigating factor at sentencing. She stated:

I know when that bill was coming out that we're trying to get FASD as a mitigating, we were quite excited because that could really really help with people who are charged with more severe charges... because someone with a severe charge can't go through our mental health court because we are just for the smaller charges. So, they're pretty well on their own and they can't even really use that as a defence.

A revealing statement by a victim witness support person (P16) also emphasized how vital it is for laws and policies to be mandated in order for individuals with FASDs to be provided adequate accommodations within the CJS. She said, "things aren't going to change unless the laws are changed and I think that's really the start place is that when umm it's mandated that we have to do certain things. That's when things get done."

This theme sheds light on how the structure of the justice system needs to be altered in order to allow for more supportive and accommodating conditions for those with FASD and other intellectual disabilities. The director of a community agency (P2) made a significant comment: "There would have to be legislation, policy and protocol developed in order to facilitate that kind of sweeping change."

#### **(5) Multidisciplinary Accommodations**

The findings of this study revealed that a significant number of participants from both sectors believed that there was a lack of formal and specialized support within the

justice system geared specifically for those with FASDs (n=11). In addition, when asked if there are any formal supports available for those with FASDs, five participants reported that they did not know of any. Two participants highlighted a formal accommodation for those with FASDs to be testimonial aids within the court such as testifying in a private place, behind a screen or by video. It is interesting to note that although these were mentioned as a formal accommodation, both participants mentioned that this formal accommodation is usually only used for victims and witnesses and is not offered to accused with FASDs. A Crown Attorney (P15) stated:

There's some testimonial aids we can use. Uh first, the first and foremost is if they are going to be a witness they can testify and promise to tell the truth, so they can avoid the issues of understanding the consequences of a oath. Um but there can be an inquiry under the Evidence Act to see if they can tell the truth or come at the threshold. Second thing is there is testimonial aids that they can have a support person there if an application's made. They can testify from behind a screen or a closed circuit TV. These are probably more accommodations for witnesses more than the alleged victims or the accused. I have never seen an accused person testify by closed circuit TV. I don't think the code even allows for that.

When asked what formal accommodations are laid out within the CJS to support those with FASDs, a victim witness support worker (P16) discussed challenges. The first relates to testimonial aids and how they are not always conducive to an individual with FASDs. Second, according to the respondent it can be a challenge to be approved for testimonial aids when an individual has a physical or intellectual disability. She said:

As victims again we have testimonial aids that are available to people that are under the age of 18 and people with physical or mental disabilities. Umm although I am not sure that we use it all the time for people under the age under 18- not always are we successful to get it for people with mental

and physical disabilities. Umm the other testimonial aid is a screen umm so the victim would sit in the court and have this screen in front of them, which would prevent him from seeing the accused. But that screen has all these dots on it and so somebody who has fetal alcohol right and that attention disorder that would drive anybody crazy but I'm sure it would drive them even more so. And then just all the distractions inside the courtroom. That definitely would affect them.

It is interesting to note that three social service agency workers mentioned that availability of support and accommodations for persons with FASDs largely depends on the jurisdiction the individual is in. It was discussed that certain jurisdictions have more programs and accommodations available to support individuals with intellectual disability and FASDs compared to other locations. When asked if the accommodations provided for persons with FASDs are effective in supporting them through the justice system, one mental health worker (P9) mentioned that the courthouse she works in provides a significant amount of accommodations to effectively support those with FASDs. She stated that "I don't think that I have seen a court work like ours." A psychologist (P10) highlighted the differences in available accommodations for individuals with FASDs when she said:

In terms of supports and I know there are particular jurisdictions and I don't know the lingo or particular police forces that are very well trained in understanding and others wouldn't be so much and again like I said particular lawyers who take an interest or you know umm who know a lot. So I think it would really depend on where you are.

One mental health professional (P9) argued that the jurisdiction she works in provides an abundance of specialized accommodations to support individuals with FASDs through the court process. She goes into detail about an alternative court dynamic where justice professionals are extensively trained to support individuals with FASDs

and individuals with FASDs are effectively accommodated throughout the court process.

She stated:

So, what happens now umm is that anybody that I suspect has FASD uh our Crown attorney will put a little sticker on the front of the file that says FASD. So that even when they are done going through our court system, let's say over the weekend they get charged with something and the Crown attorney does watch court which is the weekend court and pulls that person's file and will see the sticker on the front. So they will know to transfer that case no matter what. The charge is reviewed to see what court it goes in, if it goes to mental health or if it goes into regular stream. So it's really working out. We have police working alongside us. We have the police initiative where they came in and we train them for 13 days on mental health. But in that training was FASD. Now's there's every shift there's at least one officer is trained with mental health much with disabilities and FASD. And they have a special badge on them so that the people are aware that these officers are trained in our area. They also carry a little card that we have created on how to speak to someone. What some of the dynamics are that you can kind of know if there's mental health, intellectual or FASD...I don't think you are going to find a court system like we have.

This mental health worker (P9) went on to explain how the court has implemented a program where individuals with FASDs can work with a community agency for a specified amount of time in order to have their sentence withdrawn or lessened. This participant highlighted that “at the end of this program they get a certificate of uhh graduation. The Crown attorney signs it and the judge signs it... It is amazing. People love our courts.”

**Informal Supports: Contacts within the community.** Participants were asked: “are there community support or resources that you can access for assistance in supporting those with FASD?” and “are there informal supports that you are aware of or that you personally use when supporting an individual with FASD throughout the court

system?”. A minor sub-theme that emerged in terms of informal support available was knowing someone within the community (n=11). It is interesting to note that more social service agency workers reported this as an informal accommodation compared to justice professionals. Seventy percent of the social service agency workers reported this as an informal accommodation, compared to only 40% justice professionals. A behaviour therapist (P7) spoke to this minor theme when she said, “it’s who you know. If there is someone advocating for you that knows people in the system such as a mental health coordinator or if you know... if they can speak up and help them.” One director of a community program (P1) spoke to this informal support in terms of getting to know people within the community when dealing with a client with FASD. She said:

Ummm I mean, we all have our contacts. You know you call the court diversion officer. You do your best. They can try and get in the back and talk umm we have some lawyers that are better than others, so we make sure that you know there’s a couple lawyers that understand and they will make accommodations and if they have a good relationship with the judge ummm I mean those are informal things.

The findings showed that a small number of participants bring the disability to the attention of the judge and other court players (n=4). Two social service agency workers and two justice professionals discussed how when they alert the judge to the individual’s disability they will often suggest ways to accommodate the individual. A behaviour therapist (P6) provided an interesting anecdote of bringing the disability to the attention of the judge. He discussed a situation in which he made the judge aware of his client’s disability and briefed him on some of the mannerisms and behaviours that should be expected of this client while he was testifying in court. He explained:

And I worked with a guy who was totally fixated by grey hair.

So as I was saying when he gives evidence he won't meet your face and he will ask you if you got grey hair. So expect him to start asking questions. Any other judge might have said excuse me sir, you're the witness, your job is to answer questions you're not allowed to ask any. I would say to this guy, he will ask questions about grey hair... expect it. It was fine, he asked a question about grey hair and they answered. This is how you got him back to give evidence.

This anecdote provides an example of an informal accommodation, tailored to the specific individual that can be effective in supporting individuals with FASDs and other intellectual disabilities in being active participants within the justice.

**What's next in terms of specialized support?** During the interview, participants were asked about what specialized accommodations could aid professionals in supporting individuals with FASDs effectively through the criminal justice system. The following themes emerged (see Figure 3).

<b>Suggestions for Specialized Support</b>
<b>1. Community Collaboration</b> "I don't think we can put all the blame on law enforcement or people in the criminal justice system because it is such as multi-system issue" (P10, Psychologist)
<b>2. Support Persons</b> "I think that um when we are dealing with people with mental health issues or FASD that there should be some sort of support person there that can make sure that they do what they need to so and that they are comfortable" (P11, Defence Lawyer)
<b>3. Trained Interviewers</b> "In an ideal world um you would have somebody trained with dealing with FASD or mental health issues or cognitive deficit issues during the interview" (P13, Defence Lawyer)
<b>4. Education about the court process for those with FASD</b> "You know educating the person too on the process" (P1, Director of a Community Program)
<b>5. Individualized Report</b> "It would be nice actually if we had some type of report before court that would say this is this person's limitations, right so that we could umm focus and make it more individualized I guess" (P16, Victim Witness Support Worker)

*Figure 3.* Suggestions for the implementation of specialized support for individuals with FASD involved in the justice system.



**Community collaboration.** Half of the participants emphasized the need for community collaboration to effectively support individuals with FASDs through the various stages of the court process (n=10). Open communication between community agencies and justice professionals about their roles in supporting individuals with FASDs would be a step in the right direction in ensuring individuals with FASDs are receiving more effective support when interacting with the justice system. One director of a community agency (P2) mentioned that, “there also needs to be a community response or support that is easily accessible by police and by the person with fetal alcohol.” One behavior therapist (P6) suggested that communication between professionals is key in making sure that everyone knows his or her role in supporting the individual with FASD through the court process. He stated:

Professionals are professionals because of that word you know and that word carries a defined responsibility. So I don't think it's the responsibility of say attorneys to look after people with FASD. It's someone else's responsibility and what you have to work out is this is where my work starts and this is where it ends and that's where yours starts and that's where your ends. So it's not about standing on toes or all that sort of stuff. There sometimes umm what people do have responsibility I think is to communicate with each other as professionals.

**Support persons.** The findings showed that having a support person in the justice system that has an in-depth understanding of FASDs would be a specialized accommodation that could not only assist individuals with FASDs but also assist justice professionals in knowing how to interact effectively with their clients. Seventy-five percent of the participants suggested the need for more support worker involvement in the CJS. A mental health worker (P8) emphasized the stressful nature of the interrogation process and the need to have the individual with FASDs connect with a support person

before being questioned. Having a support person involved throughout the process has the potential to be an effective strategy to assist the individual with FASDs throughout the court process. She stated:

I think the number one key is trying to get connected with a person who is that person's support system. So if they have a support worker, a social worker that they could be connected I think the legal system needs to touch base with them and have that person involved throughout the process.

A police officer (P20) also highlighted the need of support workers within the justice system to assist individuals with FASDs be active participants within the court process when he said:

Well obviously having somebody that's educated and trained in that type of disorder you know the most severe type characteristics to even less severe and what the causes are. I guess it would almost have to be a one on one counselor for these individuals where they could attend court with them and provide insight as to you know what these people experience. What you know what type of disabilities they have... what type of hardships they have experienced. To basically educate everyone else around them as to what they are going through.

This police officer (P20) went on to suggest the presence of support workers in the courtroom when the individual is testifying. He emphasized that because the nature of the courtroom is often intimidating, having a support person there would be a way in which to make the person with FASDs feel more comfortable, resulting in providing the best evidence possible. However, he did mention that he was under the impression that testimonial aids are generally only available for victims of crime and not an accused. He stated:

A person with less of a mental capacity to understand it just seems that these counselors and support people are allowed to be in the courtroom but they are not allowed to interact. But that

might be a start right? To help put these people at ease. Or when they are up there testifying perhaps they don't have to stand there alone. They can have that support person with them there. Umm just that sort of thing really isn't allowed right? So I mean that I don't know ... I truly don't know how they could make it. I know it's a very formal and intimidating experience for the experienced persons, let alone somebody that doesn't understand what's going on and has a disability and a lack of understanding his surroundings and feeling uncomfortable. I think they could just work on the comfort level of court and you know helping these people just feel a little more relaxed. You know they might have a little more success with getting good testimony and the truth, right?

One defence lawyer (P13) also spoke to the need of support workers stationed within the justice system to provide more specialized and focused support that is needed to aid individuals with FASDs not only through the court process but arranging a plan for when they are released from custody. He stated:

We have some organizations that help people with some issues with that. We have Native court workers that help with some of our clients who have... at least the ones in the justice system have lots of mental health issues and addiction issues as do most people in the criminal justice system frankly. Canadian Mental Health has a court worker, a couple of them. Court workers are a growth industry but they are available. So they are able to come up with some supports within the community and try to find some temporary beds and that kind of thing. I emphasize temporary. More of those people would be nice if you had, whether its FASD or mental health or addiction.

***Trained interviewers.*** A minor theme that emerged in terms of specialized accommodations that should be implemented within the justice system for those with FASDs was the need for trained interviewers (n=4). Three social service agency workers, while only one justice professional suggested this as a way to accommodate those with FASDs. The findings suggest that having professionals within the justice system that are trained in FASDs and have an in-depth knowledge of how to effectively interact and

question them during interrogation and court testimony would be a way to support this population in being active participants within the CJS. A director of a community agency (P4) highlighted the challenge in individuals being manipulated by the interview during questioning, resulting in false confessions and the need to reevaluate appropriate interrogation techniques. He said:

Well again we need to think about uh we need to think about changing the way the laws work. Both the laws regarding interrogation and what we think of as informed consent for interrogation purposes and what we think is appropriate interrogation techniques. So people with FASD can be manipulated into saying many things and those confessions are not inadmissible simply because they've been manipulated. So the tools that we use to elicit confessions from people are based upon the ideal that people are cognitively aware so that's one problem.

It was also suggested by the victim witness service support worker (P16) that there should be a pre-approved list of questions that are in accordance with what the individual being questioned will understand. Having a list of questions prepared before the interrogation takes place can be an additional way to ensure that individuals with FASDs will understand what they are being asked is understood. The victim witness service support worker (P16) stated:

So I would like to see and I don't know how this is going to be accomplished but I would like to see a list of questions for people to give them a special accommodation to make sure that they are appropriate questions. That they are not complex, maybe multiple sentences strung into a question. So that they are more scripted I guess. And that somebody, maybe a professional that can look at those questions and say yes, these are an appropriate question for this intellect.

***Educating those with FASD about the court process.*** A minor theme that emerged with social service agency workers was the need for increased education for

individuals with FASDs in terms of understanding the “ins and outs” of the court process (n=5). Participants in this sector discussed that the justice system is very complex and individuals with FASDs must be educated and gain an understanding of their rights and their role when they are interacting with the CJS. A director of a community program (P1) highlighted this when she said:

You know educating the person too on the process. It think that really helps. Because it's that unknown. Um... you know um I really try, I try to use a lot of social stories when we are in those situations. And go over and over it and over it and try you know, this is what's going to happen. Um and sometimes the cuing will help. Um it's just a really bad experience someone with FASD.

One Crown attorney (P15) emphasized the relationship between understanding legal rights and empowerment. He discussed how individuals with FASDs must be educated on their legal rights in order to receive equitable treatment within the justice system. He stated:

Well I think they have to be empowered to have uh their role in the justice system has to be explained their rights have to be explained. Obviously if they have advocates be support persons or people that take time to try to get the best out of the justice system for them that would help them I think um to sort I go back to that they have to feel respected by the system uh they have to feel they are listened to by the system and they are getting their point across be they an accused be they a victim. I do think the system has to accommodate them so at the end of the day they have to think their voice has been heard and understood.

***Individualized report.*** A victim witness support worker highlighted the need for a person-centered individualized report to be created for individuals with FASDs who are involved within the justice system. She stated, “it would be nice actually if we had some type of report before court that would say this is this person's limitations, right so that we

could umm focus and make it more individualized I guess”. Implementing a report like this for individuals with FASD has the potential to educate justice professionals about FASD and the individual in a very individualized and person-centered approach.

### **Hypothetical Case Scenarios**

Following the more general questions, participants were asked questions about two hypothetical case scenarios in terms of how FASD played a role in the offence and what ways would best support the individuals through the CJS. The following hypothetical case scenarios were provided to participants:

*An individual with FASD was charged for assault after being dared by a friend to get into a physical fight with a neighbour. The assault resulted in the neighbour suffering broken ribs and a broken nose. During interrogation, the police officer asked the individual with FASD questions about their role in the offence and the specific details of the assault. The individual had difficulties remembering the details of the crime and struggled answering most of the questions asked. The police officer continued to interrogate and question the individual until he became extremely agitated and hostile towards the officer.*

*A man in his mid-thirties is at home on his computer and comes across an internet chatroom. He begins talking with a young girl in this chatroom. During this conversation he asks the girl to go on webcam and take her top off. He says he will take off his clothes on webcam if she does. A while later, police come to his door to arrest him. During police interview, the officer asked the individual with FASD questions about why he was talking to underage girls in this chatroom. The individual's answer was: "I thought if I showed them what I have to offer I could get a girlfriend." During questioning the individual responded yes to every single question asked by the officer and became increasingly upset, beginning to yell at the officer asking him to stop.*

The following presents the consistencies and differences between the general interview questions and the hypothetical case scenarios in terms of challenges and ways to support those with FASD.

**Challenges faced by accused persons with FASD.** In total, the findings of these case scenarios were consistent with the participants' general responses about the challenges individuals with FASDs experience when in the justice system. In terms of

both hypothetical case scenarios, when asked “how did FASD play a role in the offence?” the themes of understanding (n=15), memory (n=17) and suggestibility (n=12) continued to emerge. However, although not prevalent in the general questions, the hypothetical case scenarios highlighted communication as an additional challenge for individuals with FASD when interacting with the justice system (n=7).

Consistent with the general questions in terms of challenges for those with FASDs, the findings from the hypothetical case scenarios also highlighted understanding as a major difficulty for those with FASD when involved with the justice system. Similar to eighty percent (n=16) of the participants who mentioned understanding as a challenge for those with FASD when asked generally, seventy-five percent (n=15) of the participants highlighted understanding as a major challenge individuals with FASD face, when asked in relation to the hypothetical case scenarios. A mental health worker (P9) made a significant comment that encompasses the difficulty individuals with FASD may experience in understanding in terms of the complexity of the justice system, the role of consequences and understanding their legal rights:

If the officer had leading questions, someone with FASD would agree to it because they don't understand what's being said, so they're just going to agree so they can finish up. They are also not going to understand the consequence of the legal system of what happened by agreeing to what happened or saying what they did. They don't understand their rights. They don't understand the process.

This quote not only highlighted the difficulty in understanding that individuals with FASDs experience in relation to the complexities of the CJS, but also how this lack of understanding can result in individuals being suggestible and providing an incomplete statement.

Throughout the general interview questions forty percent (n=8) of the participants discussed poor memory more generally in terms of difficulty remembering court dates and the details of the crime they were apart of. When probed further with the use of two hypothetical case scenarios, a larger proportion of both social service agency workers and justice professionals highlighted memory as a challenge for individuals when interacting with the justice system during police questioning or testimony (n=17). When participants were asked about how FASDs played a role in the offence and the challenges the individual experienced when being questioned, eighty-five percent of the participants highlighted difficulty with memory as a contributing factor. Participants specified that the recall of individuals with FASDs is often lacking and they sometimes have difficulty remembering the details of the crime they witnessed or took part in. For example, when reflecting on the difficulty the individual within the hypothetical case scenario experienced when being interviewed by police, one mental health worker (P8) explained that, “sometimes they can’t remember what’s happening. They can’t really tie in situations and really see the correlation between their action and the end result. So, that’s probably one of the big reasons is that they just don’t have the ability to retain that memory and to express themselves appropriately”.

Although only four out of twenty participants pointed to suggestibility as a general issue for individuals with FASDs when interacting with the CJS, when probed further during the hypothetical case scenario portion of the interview three times more participants from both sectors mentioned suggestibility as a challenge (n=12). One mental health worker (P9) mentioned that the individual within the scenario could have been “manipulated into the situation”. Moreover, a police officer (19) discussed how FASDs



played a role in the offence in terms of the individual “being gullible enough to just go and start a fight with someone because someone dared you”. The Crown attorney (P15) also emphasized suggestibility in terms of being manipulated into taking part in crime when he said, “from my understanding they are easily suggested, so the fact that they were sort of dared into doing it”.

The Crown attorney (P15) went on to discuss how individuals with FASDs can be further disadvantaged during this stage of the justice system in terms of being led by police during questioning and interrogation. He said:

The way the interview questioning questions are framed may be leading or suggestive of the answer. He may want to please the officer or give the right answers to an authority figure when he's pressed again he may get more agitated because he is frustrated not being listened to not getting his point across.

When participants were asked more generally about challenges individuals with FASDs experience when interacting with the legal system, only the Crown attorney (P15) and one police officer (P20) mentioned communication as a difficulty that individuals with FASD may experience. In contrast, when questioned further in the hypothetical case scenario section, an increased number of professionals (n=7) highlighted communication as a struggle for those with FASDs when involved with the CJS when being questioned by police. When participants were asked why the individual in the hypothetical case scenario would provide fragmented and vague answers when being interrogated by police, the Crown attorney (P15) highlighted how it can be difficult for individuals to express themselves effectively when answering police questions, especially paired with the challenge of remembering the details of the crime. He stated, “I think they may have

difficulty having the same level of recall perception and ability to articulate responses that are expected of so called ‘normal people’”.

**Suggestions to support.** Participants also highlighted that changes to the environment can provide a more supportive and positive experience throughout the criminal process. When participants were asked how professionals could effectively accommodate the individual with FASDs in the hypothetical case scenario, it was highlighted that providing support persons (n=12), altering the interview techniques during interrogation (n=8), slowing down the process (n=4) and interviewing the individual with FASDs in a private place (n=3) could be effective ways to support the individual through the process.

Consistent with the general findings, over fifty percent (n=12) of the participants pointed out the importance of having a support person available within the justice system to aid individuals with FASDs in navigating their way through the CJS. One psychologist (P10) highlighted the need of having a support person present that the individual trusts in order to ensure that he or she is calm during the interview process. She stated, “perhaps you know this is assuming that the person has already been identified as having FASDs, you know do they have a support person? So they have somebody who works with them or a family member? Someone who can be with them to calm them down.” A behaviour consultant (P5) pointed out that a lack of support during the police interview process can lead to individuals FASDs experiencing challenges answering police questions and communicating effectively with justice professionals. He said:

I think for the interview with the police, it really should not have occurred without umm support, either from staff or family etc. Somebody that knows the individual and how to ask those kinds of [interview] questions. I mean just having

the support there is an incredibly high pressure situation with officers that frankly frequently use intimidation and tricks. So if you don't have support in that system regardless if you have FASD, it's very difficult to answer clearly and give the officers what they want. So having a support system there already, that knows the individual will help massively.

One police officer (P19) highlighted the importance of having a support person that is knowledgeable about FASDs present during police questioning to ensure that individuals with FASD are asked questions in a way that they will understand. He stated:

Draw on community support to uh... maybe a social worker or somebody that's had training with people with FASD and maybe bring in somebody else, a third party to kind of facilitate the interview and just be that go-between. The intermediary between the two of them [person with FASD and police officer], so that the officer can ask them "this is what I need to know" and they can try to communicate with the person in a way that they might respond better.

In accordance with the general responses, when participants were asked about how the court could respond to assist persons with FASDs through the CJS the theme continued to emerge with both sectors in terms of having a trained interviewer during police interrogation (n=8). A defence lawyer (P13) highlighted the importance of having an interviewer that is trained in asking questions in order to elicit the best responses from individuals with FASDs. It was also pointed out that interviewers do not often take into account the best interests of the accused. He stated:

In a perfect world you would have somebody trained with dealing with FASD or mental health issues or cognitive deficit issues during the interview. Understanding that umm sometimes open-ended questions are best and sometimes it's best to guide a little bit. Although, that does sort of ignore the fact that for the most part the police are trying to get evidence to support a criminal charge. They are not necessarily trying to do something that's in the best interest of the FASD client or the FASD accused.

Another defence lawyer (P14) stressed the importance of police officers altering their interview style in a way that would be more sensitive and supportive when questioning individuals with FASDs as opposed to being intimidating. He stated:

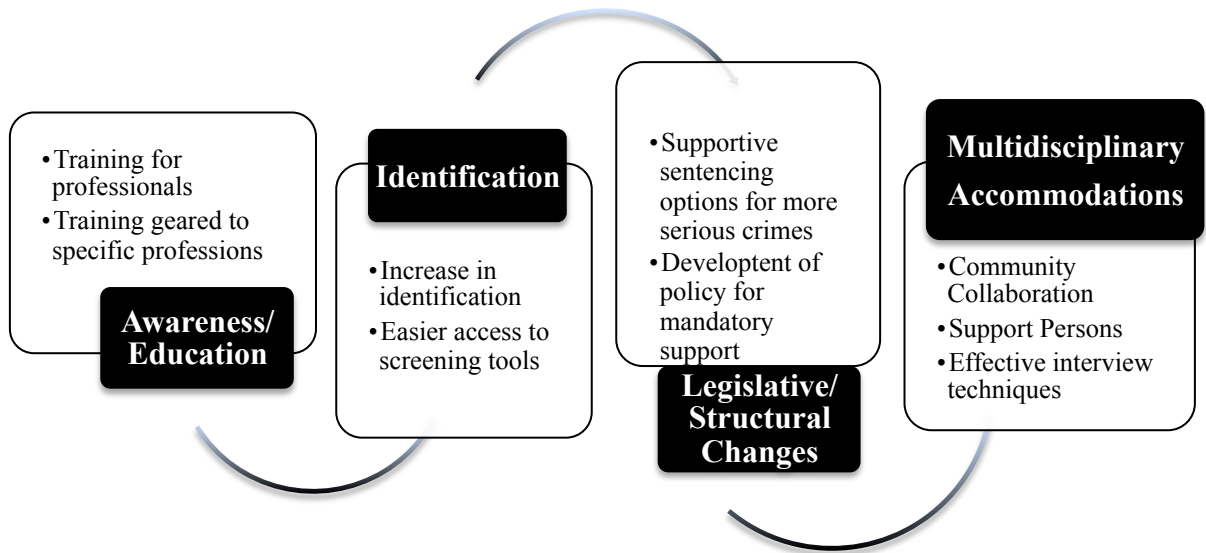
Well police interrogation takes different... you know they all have different varieties [interview techniques] right? And they can be aggressive and threatening or they can be you know trying to be your best buddy. So probably a more gentle approach would work with FASD people better.

When asked, “how could justice professionals respond to assist the person to answer and provide their best evidence?” participants mentioned the need to slow the justice system down (n=4) and ensure that individuals with FASDs are provided with a quiet and private place when being interviewed by police or during testimony (n=3). One significant comment by a police officer (P20) highlighted the importance of both slowing the process down and providing a comfortable environment to support those with FASDs during questioning. He stated:

So you almost have to put them in an environment where they feel comfortable and they understand what's going on. And you know perhaps having someone with them um explaining things to them, slowing the process down. Whatever the circumstances... whatever it is that you have to do to make that person feel more comfortable and less intrusive then you know you're going to get a more natural free flowing conversation and probably the best evidence you are going to get from them. Or even perhaps umm you know recorded rather than getting up in front of 40 people in front of the courthouse. You know you got the judge there beside you. You can almost have a sworn statement and I know they have done this with children. You record it, they are by themselves. You ask them the questions, there is not 100 set of eyes staring at them where they feel uncomfortable and you get a more natural honest answer out of it because they just don't have that you know... they're just not nervous and they are in a more

comfortable environment.

The officer pointed out that making adjustments to the individual's environment has the potential to support them in answering questions with more ease, and gaining more fruitful information as a consequence.



*Figure 4.* Conceptual model of the results found in this study. These suggestions for change can address the challenges individuals with FASDs often experience while interacting with the court process.

## Discussion and Conclusions

### The Changing Conceptualization of FASDs in the CJS

The justice system operates on the notion that individuals commit crimes intentionally and voluntarily (Roach & Bailey, 2009). However individuals with FASDs often act impulsively and without much thought placed on the outcome and consequences of their behaviours (O'Malley, 2008). This poses a problem within the justice system because the structure of the CJS does not often take into account the biological

differences that can influence an individual's choice to take part in crime and furthermore, how it will impact their experiences when interacting with the justice system.

The biopsychosocial perspective explains intellectual disability through a holistic lens that takes into account not only an individual's biological and psychological differences but also how those differences can influence the individual's external environment (Wicks-Nelson & Israel, 2009). Within the current study, participants conceptualized FASD through a biological lens whereby their primary disabilities have placed them at a disadvantage when interacting with the social world, specifically when navigating their way through the legal process (Kirby, 2004). Emphasis was placed on how the effects of prenatal alcohol exposure has resulted in permanent brain damage and increased cognitive and behavioural difficulties such as impulsivity, issues with understanding and memory. Although participants highlighted the biological differences associated with FASDs, many participants within both sectors also conceptualized FASDs through a psycho-social model whereby onus was placed on the justice system to effectively support those biological differences through multidisciplinary accommodations, such as modification of interview techniques, increased use of support persons within the courthouse, providing testimony in a private place, and ensuring that they are treated with respect. This can result in individuals with FASDs experiencing less stress throughout the court process. This finding is consistent with the social paradigm of disability, as explained by Owen et al. (2009) that places an increased responsibility on social service delivery systems to effectively support and accommodate those with intellectual disability. A comprehensive and holistic understanding of FASDs through a

biopsychosocial lens helps to bring increased attention for the need to recognize the biological differences of others and the responsibility of the justice system to provide individualized and person-centred accommodations that address these differing biological and emotional needs (Dart et al., 2002; Wicks-Nelson & Israel, 2002).

Conceptualizing the legal rights of those with FASD through a biopsychosocial perspective is consistent with Article 13 of the UN Convention on the Rights of Persons with Intellectual Disabilities (2006), that outlines the justice system's responsibility to provide accommodations for individuals with ID when involved within the CJS.

Recognizing not only an individual's biological differences but also how those differences can be supported within the CJS can help to ensure that individuals with FASD and other intellectual disabilities are able to access their legal rights meaningfully. This can be a way to prevent miscarriages of justice for individuals with intellectual disability that often occurs due to the lack of attention to the needs of those with ID (Flynn & Arstein-Kerslake, 2014; Ortoleva, 2011).

The biopsychosocial perspective, illustrated by the justice professionals' responses, framed their responses to more specific questions about the limitations of the justice system for persons with FASDs and suggestions for reform in order for substantive equality to be realized for this population. Their perspective included two suggestions for structural changes within the justice system that take into consideration the unique features of persons with FASDs. Within this context, the professionals were thoughtful about addressing very specific ways of addressing the needs of persons with FASD within a legal context.

## **Legislative and Structural Changes**

The current study suggests the need for structural changes to the justice system to ensure individuals with FASD are able to access substantive equality. Participants reported that the legal rights of those with intellectual disability are often not met within the justice system. The challenges individuals with FASDs experience such as difficulty understanding the complexity of the legal process (McLachan et al., 2014) and remembering details of the crime (Blackburn et al., 2010) can place this population at a disadvantage when attempting to access their right to equity within the CJS (Hamelin et al., 2011). For example, individuals with FASDs have a tendency of being suggestible (Fast & Conry, 2009; Moore & Green, 2004) which can lead to being easily lead by police officers, resulting in false confessions (Clark et al., 2004). Accordingly, Fast and Conry (2009) emphasize that the features of FASDs can put an individual at risk of not accessing their inherent right to justice.

In relation to individuals with FASDs not accessing their right to justice on an equal basis with others, one behavior therapist (P7) emphasized that the CJS tends to treat everyone the same and does not often address the individual needs of others. This finding is inconsistent with the concept of substantive equality whereby equality is achieved through differential treatment by addressing the barriers that can prevent equal access to justice (Law Commission of Ontario, 2012). Hamelin et al. (2011) highlights that being treated equally within the justice system does not necessarily guarantee that the legal rights of those with intellectual disability are being supported. The Law Commission of Ontario (2012) emphasizes the importance of applying substantive equality to support those with intellectual disability. In order for individuals to achieve substantive equality



within the law, the implementation of specialized and person-centered accommodations needs to be a main focus for policy makers (Law Commission of Ontario, 2012)

The respondents emphasized that the justice system is not structured to support those with FASD effectively through the process. Participants highlighted that justice professionals are constrained by legislation and are often not often able to provide flexible sentences for individuals with FASDs. The Criminal Justice System is often not equipped to fashion a creative sentence that is therapeutic and supportive for individuals with FASDs (Moore & Green, 2004).

The concept of therapeutic jurisprudence can be a way to promote the well-being of individuals with FASDs when involved in the justice system as well as promote the integration of more specialized accommodations to support this population. Therapeutic jurisprudence is a concept whereby the law and its processes can be therapeutic and rehabilitative (Wexler, 2011). Although therapeutic jurisprudence does not attempt to alter the basis of law, its goal is to provide a more therapeutic approach to the legal process and its outcomes for offenders (King, 2008). A more widespread use of therapeutic jurisprudence within the CJS for individuals with FASD can be a first step in altering the structure and the practices of the justice system to minimize the challenges individuals with FASDs experience when interacting with the justice system. It is important to note that the concept of therapeutic jurisprudence can be applied to the biopsychosocial perspective where focus is being placed on how the external environment can play a role in supporting an individual's biological differences and emotional needs (Wicks-Nelson & Israel, 2009). In accordance with both therapeutic jurisprudence and the biopsychosocial lens, more flexibility (King, 2008; Wexler, 2011)

should be given to justice professionals to address the differing needs of those with FASDs, through the implementation of various supportive accommodations such as qualified support persons (Ericson et al., 1994) and the development of an individualized court report (Pathak, 2010).

Participants further suggested the need for the structure of the justice system to change in order for those with FASDs and other intellectual disabilities to be supported. One mental health worker (P9) highlighted the possibility of a new bill that would consider FASDs as a mitigating factor at sentencing. There has been a recent push for the enactment of Bill C-583 (2014) that would alter the Canadian Criminal Code to include a definition of FASDs. Bill C-583 (2014) proposed a number of suggestions that would provide a more supportive and accommodating experience for those with FASDs when interacting with the justice system. Bill C-583 (2014) also proposed to include FASDs as a possible mitigating factor during sentencing. In accordance, Roach and Bailey (2009) emphasized that when fashioning a sentence judges often focus solely on the guilty plea of the individual, however, more focus should be placed on the factors that played a role in the offence, such as secondary victimization (Smith-Thiel et al., 2011). In fact respondents within the current study emphasized the lack of identification as a major issue for those with FASDs. Bill C-583 (2014) would address this issue, as judges would have the power to order an assessment of FASDs, currently only possible for youth. Additionally, the enactment of this bill (Bill C-583, 2014) would allow judges to order the development of a support plan that addresses the needs of those with FASDs more specifically.

## **Awareness, Education and Training**

Supported by structural changes, there is a need for increased understanding and awareness of FASDs for justice professionals. A major finding was that justice professionals lack an in-depth knowledge of FASDs and how to effectively support persons with FASDs through the various stages of the justice system, compared to social service agency workers. This is not surprising since social service agency workers, like mental health workers, would have received training on a variety of disorders.

Additionally, the criminal justice system is structured around capacity and culpability. One mental health worker (P8) bluntly stated that she received an increased amount of training about FASDs in the treatment settings she worked within and much less in the legal settings. Consistently, Moore and Green (2004) have highlighted that justice professionals such as police officers, lawyers and judges are not aware of primary disabilities of individuals with FASDs and how the characteristics of their disability can impact their experiences within the justice system. This suggestion by justice professionals for an increase in awareness and training opportunities is also consistent with the suggestions released by the Government of Alberta (2009) in the consensus statement that outlines the increasing need for awareness of FASD for professionals who work with this population.

Also consistent with the consensus statement on Fetal Alcohol Spectrum Disorder (Government of Alberta, 2009), respondents in this study discussed the need for education and training about FASDs to be specialized to the participants' profession. Participants emphasized the importance of training to be practical and relevant to the specific environment the individual would be interacting with. For example, one Crown

attorney (P15) discussed that training he receives should be criminal justice specific of how to support this population within the legal environment. Participants also highlighted the need for practical solution-based strategies to be integrated into training and education courses about FASDs. These suggestions by the participants are in accordance with suggestions by Fraser (2008) who highlighted the increasing need for consistent training for justice professionals who interact with this population. Before the needs of those with FASD can be addressed, awareness of FASDs more broadly must occur in a number of service delivery systems. The difficulties individuals with FASDs experience is a multi-systemic issue and before evidence-based practice and accommodations can be implemented, key players within various service-delivery systems such as the justice system must have an in-depth understanding of FASDs. Knowledge would include the primary disabilities associated with FASD, how to recognize the features of the disability, and key steps required to support persons effectively. The results of this study show that both justice professionals and social service agency workers believe education about FASDs and other intellectual disabilities to be crucial in order to support them effectively.

### **Identification and Screening**

The findings from the current study indicate that both social service agency workers and justice professionals find the lack of formal identification of FASDs to be a major issue within the criminal justice system. Representatives from both sectors highlighted that individuals will sometimes go through the entire legal system without ever being identified. This finding is similar to other research previously discussed that emphasizes the lack of early identification of an intellectual disability within the justice

system (Douglas, et al., 2012; McAfee & Gural, 1988; Smith et al., 2008).

The respondents pointed to the relationship between identification and the ability to provide supports. Without formal identification, literature points to other systematic ways of gathering information about a possible ID. Marinos et al. (2009) suggested justice professionals ask basic questions about an individual's history to help identify a possible intellectual disability, such as the suggestions by the Southern Network of Specialized Care (2013) that outlines questions justice professionals can ask clients to determine a possible ID. The questions are important as a screening tool for professionals. Of course there is a need for professionals involved in the justice system to be attuned, with training, to any historical or behavioural anomalies to trigger the use of the questions. FASDs is a varied spectrum where outward physical features are not always present, resulting in the disability often being overlooked by justice professionals. This can lead to a lack of support through the legal process for this population. With physical indicators of FASDs often absent, education for justice professionals in terms of the behavioural characteristics of the disability can help to ensure that professionals are able to recognize the behavioural features of FASDs, leading to an increase in identification (Moore & Green, 2004; Pauls, Pearson & Bailey, 2006).

A major issue that was recognized in the current study was that even when professionals suspected a client may have FASDs, they were not informed of where to go to access a formal diagnosis. Access to standardized screening tools to identify FASDs is limited and varies across jurisdictions. However not every jurisdiction has the resources and services to formally diagnosis individuals with FASDs (Burns, Breen, Bower, O'Leary & Elliott, 2013; Chudley et al., 2005), further marginalizing this population and

preventing adequate access to the necessary services to accommodate these individuals. As previously stated, the ALARM screening tool developed by Fast & Conry (2009) can be an effective tool that can be used by professionals across jurisdictions to screen for FASD. The widespread use of a standardized tool such as the ALARM Screening Tool (Fast & Conry, 2009) can be a first step in accurately identifying FASDs on a more consistent basis.

When discussing identification of FASDs within the justice system, participants highlighted that the main ways identification does occur is through self-identification. One police officer (P17) mentioned that self-identification is most commonly the only way justice officials will learn of an individual's disability, however they are not required to disclose such information. Reliance on self-reports can be a challenge because in many cases individuals with FASDs and other developmental disabilities try to mask or hide their ID to avoid the stigmatization that sometimes accompanies the identification of a disability (Edgerton, 1993). Easier accessibility to formal screening tools (Astley & Clarren, 1997) to identify FASDs within Canadian courthouses will allow for greater identification of the disability. This can lead to individuals with FASDs being provided the required accommodations to support their needs effectively.

The final finding within the theme of identification that emerged was that there is more attention and support provided for youth with FASDs in terms of being identified compared to adults. One director of a community program (P3) mentioned that there is a higher level of intervention and support available for youth suspected of FASDs identified compared to adults. Consistent with this finding, Roach and Bailey (2009) emphasized the increased difficulty in accessing an assessment for an adult with FASDs

compared to a youth. Inconsistencies in identification by age is further supported in terms of judges' ability to order FASDs assessments (Pathways to Justice, 2008). Under Section 34 of the Youth Criminal Justice Act (2002), judges are able to order a psychological assessment. Although judges have the power to order an assessment for fitness to stand trial or criminal responsibility for adult cases, judges do not have the power to order an assessment to identify FASDs as a possible mitigating factor (Pathways to Justice, 2008). As previously stated, the passing of Bill-583 (2014), would allow for this possibility in terms of not only allowing for FASDs assessments within the justice system but considering FASDs as a possible mitigating factor during sentencing. Providing more flexibility for judges in terms of ordering assessments for adults can help to ensure there is an increase in early identification of FASDs within the justice system for both youth and adults.

### **Challenges in Understanding, Memory and Suggestibility**

Similar to Novick- Brown (2008) who highlighted challenges individuals with ID often experience within the CJS, the interviews illustrated that individuals with FASDs often experience a number of challenges when interacting with the justice system. These challenges included difficulty in understanding abstract concepts (McLachlan et al., 2014; Ericson & Perlman, 2001), memory retention (Blackburn et al., 2010; Fast & Conry, 2009) and suggestibility (Fast & Conry, 2004; Moore & Green, 2004). It is evident from the results that both justice professionals and social service agency workers felt that individuals with FASDs are at an increased risk of being disadvantaged within the justice system due to the primary disabilities associated with their disability. Similarly, Moore and Green (2004) highlight the challenges individuals with FASDs

experience when involved in the justice system such as suggestibility as well as how these difficulties are often magnified when involved with the CJS.

Participants suggested that the complexity of the justice system plays a role in individuals with FASD's lack of understanding as a major issue they face when involved in the justice system. This finding is similar to the comments previously highlighted by the Law Commission of Ontario (2012) that emphasized the complexity of the CJS and challenges those with ID often experience when interacting with the justice system. Also consistent with this finding, McLachlan et al. (2014) found that youth with FASDs who are involved in the CJS do not effectively comprehend the intricate nature of the justice system. They went on to report that individuals with FASDs do not often understand the rights read to them when they are arrested and what it meant to waive those rights. Research by Ericson and Perlman (2001) have also highlighted this finding when results statistically found that participants with ID were able to effectively explain less legal terms than those with the absence of a disability.

In addition to challenges with understanding abstract concepts, individuals with FASD often have challenges with memory retention and memory recall (Blackburn et al., 2010), which can cause additional challenges when they are involved in the justice system in terms of remembering specific details of the crime they witnessed or took part in (Fast & Conry, 2009). Fast and Conry (2009) also suggest that challenges in memory may also result in individuals not being able to connect cause and effect making it difficult to learn from past mistakes. Although participants in this study also highlighted memory as a major difficulty for those with FASDs when involved in the legal process, the concept of time and remembering appointments came to light.



Participants not only highlighted the challenge in remembering details of the crime, which is consistent with literature (Blackburn et al., 2010; Fast & Conry, 2009) but went on to discuss that persons with FASDs have difficulty remembering scheduled court dates and appointments, such as meeting with their probation officer. This can be related to findings by McBrien et al (2003) where it was found that individuals with FASD are often incarcerated due to breaches in their probation orders. This is a critical finding because it can explain why individuals with intellectual disability often breach their probation by forgetting court dates and probation meetings.

Similar to research by Clare and Gudjonsson (1995; 1993), participants reported that a major challenge for individuals with FASDs when involved in the justice system is that they are often very suggestible. Individuals with FASDs can be easily led by interviewers when being questioned about the crime they witnessed or took part in (Fast & Conry, 2009; Moore & Green, 2004). This characteristic of FASDs can be a serious issue because it can result in false and incomplete confessions from the accused. Individuals with FASDs can be easily influenced, especially when put in a high stress situation with many social pressures to confess to a crime (Fast & Conry, 2009; Moore & Green, 2004). Justice professionals' lack of training about the characteristics and primary disabilities associated with FASD can be a reason why the validity of a confession is not always questioned. Justice professionals may not be aware that individuals with FASDs are easily suggestible and therefore do not have the ability to question the legitimacy of an admission to a crime, leading to individuals with FASD being sentenced to a criminal act they did not necessarily commit (Moore & Green, 2004).

Approaching challenges such as difficulties with understanding, memory and suggestibility through a biopsychosocial perspective can help to ensure that individuals with FASD are able to access justice in a more accessible way. This can be achieved by not only placing focus on the psychological and biological difficulties associated with the disability, but by also examining the ways the environment can adjust to support these individual, biological and emotional differences that not only address the cognitive and behavioural challenges associated with FASDs but also address the anxiety and stress that can result from police interrogation. For example, these findings lend itself to the need for increased understanding of FASDs for justice professionals in terms of the primary disabilities associated with FASDs and the challenges they often encounter in the CJS. If justice professionals received training about the difficulties individuals with FASDs encounter in the justice system, then they would be better prepared to interact with this population and address these common challenges in a way that reflects this population's equal right to justice.

### **Multidisciplinary Accommodations**

Although some respondents from this study reported the use of informal accommodations (those not listed in the Criminal Code or policy and that you or others have developed to support someone) the results indicate that there is a lack of formalized, system-wide accommodations available within the Criminal Justice System for individuals with FASDs. This is consistent with literature that states there is a lack of formal accommodations for individuals with intellectual disability and dual diagnosis more broadly (Cockram, Jackson & Underwood, 1998; Ericson et al., 1994; Hamelin et al., 2011). The Canadian Criminal Code (1985) includes support within the CJS for

individuals with the broad identification of ‘mental disorder’. As laid out in section 486.1 and 486.2 of the Criminal Code (1985), testimonial aids are available for individuals who have an identified intellectual disability. These formal accommodations include having a support person present during interrogation, as well as testifying behind a screen or in a private space (Canadian Criminal Code, 1985). Within the current study, a major issue was brought up in regards to testimonial aids in terms of availability for accused with FASD. A quote by a Crown attorney (P15) should be examined in more depth. He stated:

There’s some testimonial aids we can use. Uh first, the first and foremost is if they are going to be a witness they can testify and promise to tell the truth, so they can avoid the issues of understanding the consequences of a oath. Um but there can be an inquiry under the Evidence Act to see if they can tell the truth or come at the threshold. Second thing is there is testimonial aids that they can have a support person there if an application’s made. They can testify from behind a screen or a closed circuit TV. These are probably more accommodations for witnesses more than the alleged victims or the accused. I have never seen an accused person testify by closed circuit TV. I don’t think the code even allows for that.

This quote is significant because it demonstrates the constraints that justice professionals experience in accessing formalized support for accused with FASDs. Although testimonial aids are available for victims and witnesses, there are no formal accommodations laid out within the Criminal Code (1985) that are available for accused with intellectual disability or FASDs more specifically. One victim service support worker (P16) also indicated that it can be extremely difficult for individuals with FASDs or any other disability to be approved for such testimonial aids. This is consistent with Hamelin et al., (2011) who emphasized that court accommodations are minimally used and often only accessed for individuals who are involved in more severe cases that go to

trial. Another important point to consider is that testimonial aids are generally only available when an individual has been formally identified as having an intellectual disability (Hamelin et al., 2011). This raises a significant issue, because as previously discussed, there is a lack of identification of FASDs within the justice system (McAfee & Gural, 1988; Smith et al., 2008; Douglas et al., 2012). This again emphasizes the increased need of consistent screening tools to identify FASD that requires a formal assessment in order to provide adequate support to ensure this population receives substantive equality.

A minor theme that emerged in terms of accommodations available within the justice system is that access to adequate support varies by jurisdiction. Participants highlighted that certain jurisdictions throughout Ontario are better equipped to support individuals with FASDs than others. In accordance with this suggestion, one mental health worker (P9) emphasized the increased accommodations and support for persons with FASD that is provided at the Mental Health court that she works in. She discussed the community collaboration that takes place in order to effectively support this population, through the increase in professional training about FASDs and willingness of the key players within the CJS to provide a more therapeutic experience for those with FASDs. This finding is consistent with the concept of therapeutic jurisprudence (Wexler, 2011) and the biopsychosocial model (Wicks-Nelson & Israel, 2009), where increased responsibility is placed on the environment to support the biological needs of those with FASD. This finding is important because it highlights how the environment can be more rehabilitative and supportive in nature in order for individuals with FASDs to access their inherent legal rights.

Although respondents emphasized the lack of formal accommodations available to support those with FASDs through the CJS, there was a general consensus from representatives of both sectors that there are informal supports that can be used to accommodate this population. An informal accommodation that was discussed by respondents was the importance of community collaboration and making connections with other professionals in the justice system and within the community. For example, one behavior therapist (P6) emphasized how open communication between all professionals involved is necessary in ensuring that professionals know their role in effectively supporting those with FASD through the legal process. The Law Commission of Ontario (2012) has also emphasized the importance of a multidisciplinary approach to supporting individuals with ID when involved with the law. In order for individuals to achieve substantive equality within the legal system there needs to be a collaborative relationship between various community members, including justice professionals and community agency workers. A multidisciplinary approach to support can ensure that individuals with FASD and other intellectual disabilities are able to access their legal rights in a meaningful way (Law Commission of Ontario, 2012). A consensus statement on FASDs prepared by the Government of Alberta (2009) further emphasizes a collaborative approach to support. Individuals with FASD interact with many sectors within the community and it is paramount that professionals within the community and within the legal system work together to ensure that individuals with FASDs are receiving comprehensive and optimal support in all areas of their lives (Government of Alberta, 2009).

Although participants highlighted the use informal support, there was a consensus between respondents that more must be done to make the justice system more accessible for this population in a systematic way (see Figure 5). Participants suggested an increase in support persons, modification to interview techniques, education for individuals with FASDs about their rights, and the development of court reports (relating to an individual accused or victim with FASDs).

As noted in this research, participants from both sectors felt that there should be an increased presence of support persons within the justice system that have an in depth understanding of FASDs and how to interact with these individuals in an effective way. For example, one defence lawyer (P13) emphasized the importance of having court support workers stationed within the courthouse that are educated about FASDs. Dual Diagnosis Justice Case Managers are stationed across Ontario and provide support to individuals with dual diagnosis through the court process (Bethesda, 2014). Workers in this position support those with dual diagnosis in attending court dates, applying for legal aid and preparing for court. Individuals in this position also collaborate with justice professionals and inform them of effective ways to communicate with their client (Bethesda, 2014). Although this position can be effective in supporting those with dual diagnosis (Bethesda, 2014), it is important to note that there is an increased need for a support person to be placed within the justice system that has an in-depth understanding of FASDs more specifically in terms of identification and appropriate ways to interact with these individuals. This finding is important because it highlights professionals' perspectives on the need for support workers to have an increased awareness and education on how to identify FASDs as well as how to communicate with them.

An interesting difference between the general responses and the hypothetical case scenarios is that the theme of communication emerged in terms of challenges persons with FASDs may experience when being interviewed by police. Respondents discussed the challenge individuals with FASDs may experience when trying to express themselves to police. Novick-Brown et al. (2011) have also noted that communication difficulties for those with FASDs play a role in individuals experiencing challenges during police questioning. Although individuals with FASD may appear and respond as if they understand the questions asked, in actuality persons with FASDs typically lack the ability to comprehend more complex questions (Moore & Green, 2004; Novick-Brown et al., 2011). These findings speak to the importance of justice professionals being aware of the complex challenges experienced by individuals with FASDs and how to effectively alter their interview techniques to support these differences.

Comparable to Jeffery (2010) and Ericson et al., (1994) who provided suggestions for modification of interview techniques for justice professionals, within the general interview questions, respondents emphasized the need for interviewers to be trained on how to effectively communicate with individuals who have FASDs. According to Perlman et al. (1994), individuals with intellectual disability are often viewed as unreliable witnesses because of their biological traits, but in practice, altering the way justice professionals ask interview questions can be a way to enhance an individual's competency, resulting in more reliable testimony. Approaching police questioning with the understanding that modifications to the interview process can result in individuals with ID and FASDs providing reliable evidence, can help to eliminate the likelihood that individuals with FASDs and other intellectual disabilities are not able to access their right

to justice on an equal basis with others. For example, consistent with Jeffery (2010), the hypothetical case scenarios highlighted that slowing down the process and providing statements in a quiet place can be ways to support those with FASDs. During police interview or testimony, slowing down the process to allow for the individual to process the information and the questions being asked can be a minor adjustment to the legal process that can support individuals with FASDs effectively through the court process (Jeffery, 2010).

Within the hypothetical case scenarios, participants also highlighted the need for testimony to be given in a quiet and private place. This is consistent with section 486.1 of the Criminal Code (1985) that outlines providing testimony in an alternate location for those with intellectual disability. The issue that lies here is that the formal accommodations laid out within the Criminal Code (1985) are only made available to victims and witnesses. Widening the scope of access to testimonial aids for offenders can be a step in the right direction of achieving substantive equality for victims, witnesses and accused with FASDs and other intellectual disabilities. Consistent with the biopsychosocial model (Wicks-Nelson & Israel, 2009), adjusting the way interviewers ask questions in relation to the crime as suggested by Jeffery (2010) and Ericson et al. (1994) can support the biological and psychological differences of the individual being questioned, further promoting a more supportive and accommodating environment.

Under the main theme of multidisciplinary accommodations, some participants discussed the need for increased education for individuals with FASDs in terms of their legal rights. Respondents also spoke to the need for individuals with FASDs to gain a deeper understanding of the complex nature of the justice system. As previously



mentioned, the role of the Dual Diagnosis Justice Case Manager is to prepare individuals with dual diagnosis for court (Bethesda, 2014). Integrating an educational component into the role of the support worker that helps to teach the individual with FASDs the court process and their role within it has the potential to ensure individuals with FASDs are active participants within the CJS and have a concrete understanding legal rights.

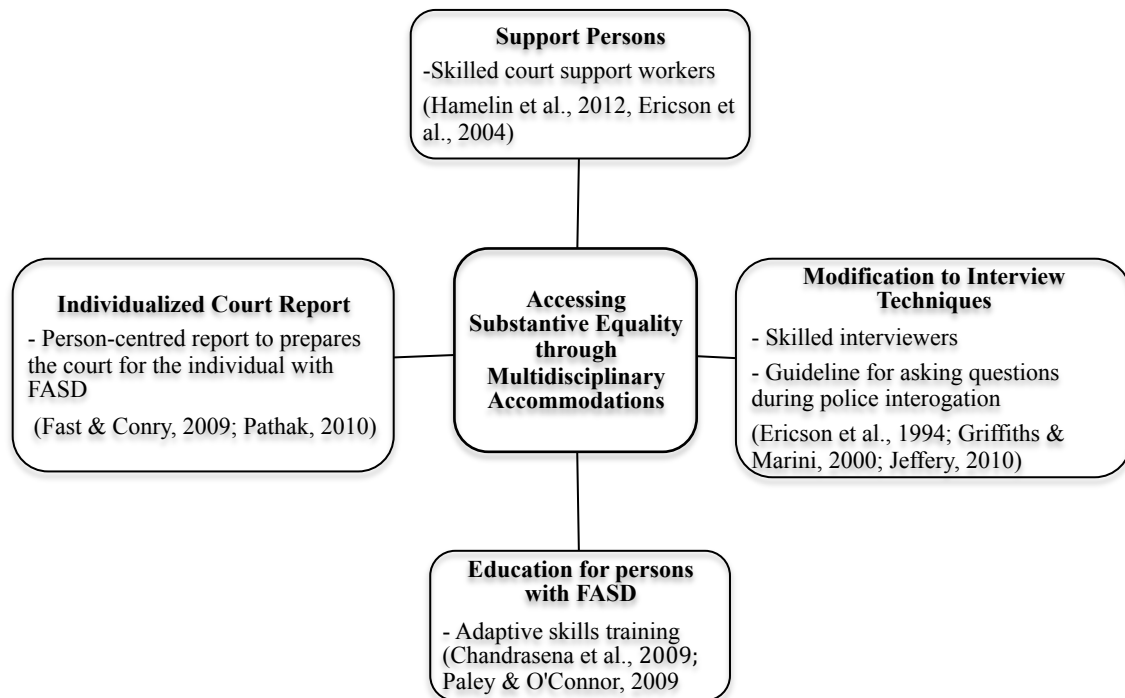
Although inconsistent with the findings of the current study, research by Paley and O'Connor (2009) emphasize the importance of providing education and adaptive skills training to individuals with FASDs before they become involved with the CJS. They argue that providing individuals with social skills training that includes education about their rights, building meaningful relationships, managing finances and maintaining stable housing can help to prevent the emergence of secondary disabilities such as getting into trouble with the law (Paley & O'Connor, 2009).

The final suggestion for specialized support highlighted by one victim service support worker (P16) was the implementation of an individualized court report that outlines the limitations of the individual with FASDs, as well as suggestions to the court about how to effectively communicate with the individual. Although only one respondent highlighted this as an important feature of support, it is consistent with Pathak's (2010) model of support that includes the development of a person-centered report that prepares justice professionals for an individual with intellectual disability in court. To reiterate, the Liverpool Model of "Witness Support, Preparation and Profiling" is a two- stage programme developed by UK social worker, Mark Pathak (2010). This holistic and comprehensive model begins by preparing an individual with an ID for court, followed by the development of a comprehensive report that outlines the limitations and strengths

of the individual with ID. This individualized court report can provide suggestions for justice professionals on the most effective way to communicate with the individual.

Although the Liverpool model was not developed specifically to support those with FASDs, the person-centered and individualized approach allows for the distinct characteristics of each individual to be addressed and supported. The development of individualized reports completed by skilled professionals who understand the features of FASDs can be an effective way to ensure that justice professionals are prepared to effectively support and communicate with this population (Fast & Conry, 2009).

The theme of multidisciplinary accommodations is meaningful because it highlights that although justice professionals and social service agency workers acknowledge the features of the disability that place individuals at a disadvantage within the CJS, they also recognize that the structure of the justice system needs to be reformed to include specialized and multidisciplinary accommodations in order to support the individual needs of those with FASDs.



*Figure 5.* Multidisciplinary accommodations to support individuals with FASD in accessing substantive equality

## Future Directions

The current research study has begun to fill a gap in the literature that examines the issues those with FASD experience when involved within the Canadian justice system. This study can shed light on future directions for research in terms of an increase in awareness, training for professionals, structural changes to the CJS and the effectiveness of multidisciplinary accommodations.

Participants in this study were from various locations across Ontario, located mainly in South Central and Northern areas of the province. Findings from this study show that the specialized accommodations available within the CJS for individuals with FASDs, largely depends on the jurisdiction they are in. Some courthouses are better equipped to support this population than others. This is why future research should

examine the support available and needed within an increased number of jurisdictions across Canada. This can aid researchers in identifying what specialized support is currently being implemented across Canada for those with FASDs who are involved in the CJS as well as provide insight into what is still needed.

The current study examined the perspectives of professionals within the field who work directly with individuals with FASDs. Although the perspective of professionals provided a great deal of insight into the challenges those with FASDs experience in the CJS and how they need to be supported, future research should examine the perspectives of individuals with FASDs directly. Tarulli and Saaltink (2011) have highlighted the importance of including viewpoints of those with intellectual disability within research. When examining the effectiveness of services, accommodations and supports, it is paramount that the perspectives of those who will be using the services are taken into account (Tarulli & Saaltink, 2011). These sentiments highlight the importance of including those with FASDs in future research to gain a deeper understanding of their experiences within the justice system and how they can be better supported. Individuals with intellectual disability have a right to be active participants within research and to have a voice in the development of services that are designed to support them (Tarulli & Saaltink, 2011).

The results have developed a useful framework for the need of a more comprehensive model that implements multidisciplinary accommodations for those with FASDs when involved within the justice system. Further research should be conducted to measure the effectiveness of a comprehensive model of support that incorporates justice professional training, an identification screening tool such as the 4-Digit Diagnostic Code

developed by Astley and Clarren (2000), as well as specialized accommodations that include skilled support persons, modified interview techniques, and the development an individualized court report. A model such as the one proposed has the potential to provide more accessible, fair and equitable experiences for individuals with FASDs while interacting within the Criminal Justice System.

### **Limitations**

This research provides insight into the issues faced by individuals with Fetal Alcohol Spectrum Disorder in the Criminal Justice System. The perspectives of working professionals within social service agencies and the justice system provided a greater understanding of the challenges professionals face in supporting this population effectively. In addition, this study provided important research about how the justice system can be altered to better tend to the needs of those with FASDs. Although this study examined the perspectives of social service agency workers and justice professionals to provide a more comprehensive understanding of the issues at hand, the perspectives of judges and diversion officers was not possible. Future research should attempt to fill this gap by including the perspectives of a wide variety of justice professionals.

The use of snowball sampling in recruiting participants could have created bias within who chose to take part in the research study. This method of participant recruitment could have caused bias because initial participants refer other professionals they know that could be potential participants. The issue with this is that participants may suggest professionals who have similar values, perspectives and opinions, resulting in participant bias.

When conducting qualitative data that uses open-ended and in depth interview questions as a form of data collection, the researcher must be aware of the potential bias that may occur due to the researcher's preconceived notions and expectations. Although the researcher tried to avoid bias by systematically coding the data, Creswell (2007) suggests the use of an external check process, where the researcher has an outside source examine the data collection and findings of the study. As stated by Creswell (2007), having an outside source examine the data and findings helps to maintain the authenticity and truthfulness of the findings.

Although the use of semi-structured interviews was a successful way in gaining an in-depth understanding of participants perspectives and allowing them to expand on points they feel would be beneficial to the outcome of the interview (Marshall & Rossman, 2011), this was the only form of data collection. Creswell (2007) highlights that collecting data in multiple ways will allow for more triangulation of the data, increasing the validity of the findings. Including the use of other qualitative data collection methods such as participant observation or focus groups could have verified and strengthened the results found in this study.

## **Conclusions**

Persons with Fetal Alcohol Spectrum Disorder are vulnerable to miscarriages of justice within the CJS due the challenges they often experience within this system, such as lack of understanding, difficulties with memory and suggestibility. Overall, there is a lack of awareness and training for justice professionals about FASDs and the complexity of how to support this population through the justice system. It was found that justice professionals lack training and education about the nature of FASDs. This often leads to a

lack of identification of the disability, as justice professionals are not skilled in identifying the primary characteristics associated with FASDs. The lack of identification of FASDs within the justice system may contribute to the shortage of formal accommodations for those with FASDs.

This study has identified that there are significant gaps within the structure of the justice system in terms of the formal accommodations available for those with FASDs. There is nothing laid out within the Canadian Criminal Code (1985) that outlines specialized accommodations for those with FASDs. Consequently, Bill C-583 (2014) has highlighted the importance of including the definition of FASDs within the Criminal Code (1985) and the need for there to be an increase of support as well flexibility in the sentencing options for judges. This is consistent with the findings from this study as legislative changes are needed to address the unique legal needs of those FASDs. The first step in achieving this is creating awareness by justice professionals about the features of FASDs, leading to the development of multidisciplinary accommodations.

Based on the current research project, it is evident that much more awareness of FASDs is needed within the justice system and in turn, this will lead to an increase in identification, resulting in the development of more specialized accommodations that can be put in place to support this population through the legal process. The biopsychosocial model of disability highlights the role of both an individual's biological features as well as the role that the environment can play (Wicks-Nelson & Israel, 2009). This approach focuses on the need for multidisciplinary accommodations within the legal process to effectively address the primary disabilities of FASDs that play a role in individuals experiencing challenges within the CJS. This multidisciplinary approach to support

emphasizes the unique needs of those with FASDs and the responsibility the justice system has to ensure that effective adaptations and accommodations are easily accessible. Although this may take time, changes must be made at the structural level. A quote by one behaviour therapist (P6) emphasized the need for change but the struggle this can pose for the Criminal Justice System. He stated:

What's the hardest thing to do? Is it to start something, to change something or to stop something? The hardest thing is to change something. Its dead easy to start, dead easy to stop but changing it is the hardest thing. And that's what I think the justice system finds.

It is time for change. This research study seeks to raise awareness of the struggles individuals with FASD face and to bring attention to the need for structural changes within the justice system that promotes a multidisciplinary approach to support for this population. Only this way can substantive equality be achieved.



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## Appendix A: Interview Questions

**Project Title:** Searching for Accommodations within the Ontario Criminal Justice System for Persons with Fetal Alcohol Spectrum Disorder

Student Researcher: Samantha Stromski, MA Student, Child & Youth Studies, Brock University

Principal Researcher: Dr. Voula Marinos, Child & Youth Studies, Brock University

Co-Researcher: Dr. Dorothy Griffiths, Child & Youth Studies, Brock University

1.) Can you tell me about your current position and your responsibilities within this position? How long have you been in this line of work?

2.) What is your understanding of Fetal Alcohol Spectrum Disorder (FASD)?

NOTE: Ask whether they see it in strictly biological terms or also in social terms.

This is how FASD is defined for the purposes of this study:

*Fetal Alcohol Spectrum Disorder is a “set of disorders that is caused by the consumption of alcohol by mothers while pregnant” (Blackburn, Carpenter & Egerton, 2010, p. 139). Individuals diagnosed with Fetal Alcohol Spectrum Disorder have neurodevelopmental impairments such as sensory deficits, gaps in focusing attention as well as retaining information. Individuals with FASD may also experience difficulties in applying proper social skills in various environments, have poor judgment, be vulnerable to manipulation and impulsivity, and do not comprehend the concept of consequences.*

### 3.) Hypothetical Case Scenario:

An individual with FASD was charged for assault after being dared by a friend to get into a physical fight with a neighbour. The assault resulted in the neighbour suffering broken ribs and a broken nose. During court interrogation, the prosecutor asked the individual with FASD questions about his/her role in the offence and the specific details of the assault. The individual had difficulties remembering the details of the crime and struggled answering most of the questions asked. The lawyer continued to interrogate and question the individual until he became agitated and hostile towards the lawyer.

A.) Based on this case, how do you think FASD played a role in the offence?

B.) Why do you think the individual responded to the daring of others as he did?

C.) The individual within this scenario provided fragmented or vague answers when being questioned. Why do you think an individual with FASD would respond this way when being questioned?

D.) How could the court respond to or assist the person to answer and provide his/her best evidence?

E.) Why do you think the individual with FASD became hostile when pressured by the lawyer during questioning?

- 4.) Have you ever come into contact with an individual with FASD in your line of work? If so, can you tell me about your experiences? Please refrain from discussing specific information about individuals or cases.
- 5.) Were you ever provided or offered training about FASD or other vulnerable populations? If so, did you find it beneficial? Why or why not?
- 6.) What could make training about FASD more beneficial in supporting you in your work with this population?
- 7.) How are persons suspected with FASD or any other disabilities identified within the justice system? At what stage of the court process do you usually find out about the diagnosis?
- 8.) What do you think are the central challenges or issues for accused with FASD when interacting with the various stages of the court system? (pre-trial, trial or post-trial)
- 9.)A) Are there formal, specialized accommodations or supports laid out within the legal system that are made available for individuals with FASD when involved with the CJS?  
B) Are they commonly used? Have you ever asked for these supports or accommodations?
- 10.) Are there informal supports (those not listed in the Criminal Code or policy and that you or others have developed to support someone) that you are aware of or that you personally use when supporting an individual with FASD throughout the court system?
- 11.) Are accommodations and support for individuals with FASD easily accessible?
- 12.) Do you think that the accommodations (either formal or informal) provided for persons with FASD are effective in supporting them through the justice system?
- 13.) Are there community support or resources that you can access for assistance in supporting those with FASD? If yes, do you find them sufficient?
- 14.) What specialized support and accommodations do you think could assist you in supporting accused with FASD during the court process? (pre-trial, trial, post-trial)
- 15.) In what ways could the experiences of individuals with FASD be made better when interacting with the justice system?
- 16.) Do you have any other comments or suggestions?

## Appendix B: Letter of Invitation

Project Title: Searching for Accommodations within the Ontario Criminal Justice System for Persons with Fetal Alcohol Spectrum Disorder

Student Researcher: Samantha Stromski, Master's Student, Child & Youth Studies, Brock University

Principal Investigator: Dr. Voula Marinos, Child & Youth Studies, Brock University

Co-researcher: Dr. Dorothy Griffiths, Child & Youth Studies, Brock University

I, Samantha Stromski, a Master's student from Child and Youth Studies at Brock University, along with principal researcher Voula Marinos and co-researcher Dorothy Griffiths invite you to take part in a research study entitled: *Searching for Accommodations within the Ontario Criminal Justice System for Persons with Fetal Alcohol Spectrum Disorder*.

The purpose of this study is to examine the experiences of accused with Fetal Alcohol Spectrum Disorder (FASD) and their interaction with the justice system through the perspectives of both justice and social service professionals. This study will also focus the accommodations currently put in place to assist persons through the various stages of the justice system. Professionals will be interviewed who work directly with individuals with FASD and professionals who interact with individuals with FASD in a legal setting.

Should you choose to participate, you will take part in an in-depth interview at a convenient time, quiet and private place of your choosing. This will ensure that the interview will not be interrupted, overheard or others voices are inadvertently recorded. This study should take approximately 1 hour to complete. The information you provide will be kept entirely confidential. This study will be audio recorded to ensure accuracy. Please be informed that you are in no way obligated to take part in this study. However, if you choose to participate, you will not be asked to discuss specific cases or individuals.

This study will benefit the academic community as well as working professionals within the community. The researchers hope to publish this study and that the finding will be useful and help to inform academic and community-based organizations.

If you have any questions about taking part in research or your rights as a research participant, please contact the Research Ethics Office at (905) 688-5550 Ext. 3035, [reb@brocku.ca](mailto:reb@brocku.ca). If you have any questions about this specific study or would like to participate, please feel free to contact us at the contact information provided below.

Thank you,  
Voula Marinos, Samantha Stromski and Dorothy Griffiths

Student Researcher: Samantha Stromski, Master's Student  
Department of Child & Youth Studies  
Brock University

Email: [ss09vg@brocku.ca](mailto:ss09vg@brocku.ca)

Principal Investigator: Voula Marinos  
Department of Child & Youth Studies  
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Co-researcher: Dorothy Griffiths  
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This study has been reviewed and received ethics clearance through the Research Ethics Board at Brock University [**file #14-035**].

## **Appendix C: Informed Consent**

Date:

Project Title: Searching for Accommodations within the Ontario Criminal Justice System for Persons with Fetal Alcohol Spectrum Disorder

Student Researcher: Samantha Stromski, Master's Student  
Department of Child & Youth Studies  
Brock University  
Email: ss09vg@brocku.ca

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(905) 688-5550 Ext. 4069  
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### **INVITATION TO PARTICIPATE**

You are invited to participate in a research study. The purpose of this study is to examine the experiences of accused with Fetal Alcohol Spectrum Disorder (FASD) and their interaction with the justice system through the perspectives of justice and social service working professionals. This study will also focus the accommodations currently put in place to assist persons through the various stages of the justice system.

### **WHAT'S INVOLVED**

- i.) As a participant, you will be asked to take part in an in-depth face-to face interview that will be audio recorded.
- ii.) The interview will take place in a private and quite place of your choosing or via telephone. This will help to make sure that the interview remains confidential. This will ensure that the interview will not be interrupted, overheard and prevent others voices from being inadvertently recorded.
- iii.) The co-researchers involved in this study will be conducting the interview.
- iv.) Open-ended questions will be asked. For example:
  - What do you think are the central challenges or issues for accused with FASD when interacting with the various stages of the court system? (pre-trial, trial or post-trial)
  - Are there informal supports (those not listed in the Criminal Code or policy and that you or others have developed to support someone) that you are aware of or that you personally use when supporting an individual with FASD throughout the court system?
  - What specialized support and accommodations do you think could assist you in supporting accused with FASD during the court process? (pre-trial, trial, post-trial)
- v.) Participation will take approximately 1 hour of your time.
- vi.) Please be informed that you will not be asked to discuss specific cases or individuals.



vii.) Approximately one month after the interview is completed and transcribed, through email we will send you an electronic copy of the transcript for you to review to ensure the interview is accurate. This will also give you an opportunity to make clear any points you wish. You will be asked to read over the transcript and respond to the researcher through email with your comments, within one month. This process will help to ensure accuracy and validity of the comments you made during the interview. This process will take approximately 30 minutes of your time.

### **POTENTIAL BENEFITS AND RISKS**

- i.) This study will benefit the academic community as well as working professionals within the community. The researchers hope to publish this study and that the finding will be useful and help to inform academic and community-based organizations.
- ii.) There are no expected risks associated with you taking part in this project.

### **CONFIDENTIALITY**

- i.) The information you provide will be kept confidential. However, please be informed that your participation may be known to others due to the snowball sampling technique and the nomination of potential research participants.
- ii.) Your name or any identifying factors will not appear in any report or publication associated with this study. However, your general position title may appear in research reports (ex. police officer, social worker, diversion officer ect).
- iii.) With your permission, anonymous quotations may be used. Please be reminded that your quotations will not be attributed by name; however, your general position title will be included.
- iv.) Data collected during this study will be stored in a locked cabinet in the Justice and Intellectual Disability laboratory at Brock University. All computers holding the data will be protected with a password. Access to this data will be only available to co-researchers working on the project.
- v.) Data will be retained for five years and will then be destroyed confidentially.

### **VOLUNTARY PARTICIPATION**

- i.) Please be advised that you are in no way obligated to take part in this study.
- ii.) You may choose to withdraw from the study at any point in time, without any repercussions or consequences.
- iii.) If you choose to withdraw from the study during the interview, the audio recording will be deleted immediately.
- iv.) In the event that you choose to withdraw from the study after the interview, all electronic and hard copy transcripts of the interview, along with any of your data will be immediately destroyed.

### **PUBLICATION OF RESULTS**

- i.) Feedback in the form of a summary will be available to research participants. Feedback will be available approximately two months after the interview. Participants may contact the researchers through the phone numbers and emails provided above.

ii.) The researchers hope to publish this study and that the finding will be useful and help to inform academic and community-based organizations.

### **CONTACT INFORMATION AND ETHICS CLEARANCE**

If you have any questions about this study or require further information, please contact the researchers using the contact information provided above. This study has been reviewed and received ethics clearance through the Research Ethics Board at Brock University [file #14-035]. If you have any questions about taking part in research, please contact the Research Ethics Office at (905) 688-5550 Ext. 3035, [reb@brocku.ca](mailto:reb@brocku.ca).

Thank you for your assistance in this project. Please keep a copy of this consent form for your records.

### **CONSENT**

I give my permission to having this interview audio recorded to ensure accuracy.

Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

I give my permission for the use of direct quotes from this interview in publication/thesis of this research.

Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

I agree to participate in this study based on the information provided to me within this consent form. I have been provided the opportunity to ask questions and gain more information about the project. I understand that I may withdraw this consent at any time.

Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

